TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910.

No. [redacted]215

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

RIVERSIDE MILLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED MAY 6, 1909.

(21,650.)

(21,650.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 441.

ATLANTIC COAST LINE RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

RIVERSIDE MILLS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

INDEX.

	Original.	Print.
Writ of error (copy)	1	1
Complaint	3	2
Process	12	7
Marshal's return of service	13	8
Verdict	13	8
Demurrer	14	9
Order overruling demurrer	17	10
Order allowing exception	18	11
Answer	19	11
Opinion on demurrer	22	13
Judgment	26	15
Opinion on the merits	27	16
Bill of exceptions	32	20
Bill of exceptions to overruling demurrer	32	20
Agreed statement of facts	33	21
Exhibit A—Bill of lading, Riverside Mills	36	op. 22
Exhibit B—Bill of lading, Atlantic Coast Line	37	op. 22

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 14, 1909.

	Original.	Print.
Motion for verdict for defendant	39	23
Objections to motion for verdict for plaintiff	40	24
Direction to jury, &c	42	25
Objections to allowance of attorney fee	42	25
Prayer for allowance of bill of exceptions	43	26
Judge's certificate to bill of exceptions	43	26
Petition for writ of error	44	26
Assignment of errors	45	27
Order allowing writ of error	48	29
Citation (copy)	49	30
Bond on writ of error	50	30
Clerk's certificate	51	31

1 In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Writ of Error.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court for the Northeastern Division of the Southern District of Georgia, Greeting:

Because in the records and the proceedings, as also the rendition of the judgment of a plea which is in the said United States Circuit Court before you, or some of you, between Riverside Mills, Plaintiff, and the Atlantic Coast Line Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Atlantic Coast Line Railroad Company, as by its complaint appears. We being willing that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 2nd day of April, in the year of our Lord one thousand nine hundred and nine.

2 (Signed) W. H. GODWIN,
Deputy Clerk of the United States Circuit Court for the Northeastern Division of the Southern District of Georgia.

The foregoing Writ of Error allowed this 2nd day of April, 1909.

(Signed) By EMORY SPEER, *Judge.*

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills versus Atlantic Coast Line Railroad Company. Writ of Error, etc., filed in office this April 3rd, 1909, at 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

3 *Complaint.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS, a Corporation,
versus
ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation.

Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Fifth Circuit:

The petition of the Riverside Mills, a corporation, respectfully shows:

1st. That the petitioner, Riverside Mills, is a corporation duly organized and existing under the laws of the State of Georgia, with its principal office and place of business in the City of Augusta, County of Richmond, State of Georgia.

2nd. That the Atlantic Coast Line Railroad Company is a corporation duly organized and existing under the laws of the State of Virginia.

3rd. That the Atlantic Coast Line Railroad Company is operating a line of railway extending from the City of Augusta within the State of Georgia to the City of Richmond in the State of Virginia, with divers branches in other states of the United States, and in operating said line of railroad, is and was at all times hereinafter mentioned, common carriers engaged in interstate commerce within the true intent and meaning of the Act of Congress of the United States governing and regulating interstate commerce.

4th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of Nine dollars and sixty cents, ($9.60). For that on the 15th day of September, 1906, your petitioner delivered to the said Atlantic Coast Line Railroad Com-
4 pany, the said articles; to wit: Twenty Bales (20) No. 1 S. White Waste, 2456 pounds of the value of One hundred and eighty-seven dollars and fifteen cents, ($187.15); said goods were consigned to the Chesapeake Steamship Company, Baltimore, Maryland, and for said Goods the said Atlantic Coast Line Railroad Company issued to your petitioner bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that the said Atlantic Coast Line Railroad Company then and there as the initial carrier undertook and agreed to transport and deliver said goods to said Chesapeake Steamship Company at Baltimore, Md., said goods being then and there an interstate shipment.

a. But although it then and there became the duty of the said defendant company to transport and deliver said goods to the consignees at Baltimore, Maryland, said defendant company has failed to transport and deliver the same to the consignees as aforesaid, but out of said shipment have only delivered nineteen (19) bales No. 1

S. White Waste of the value of one hundred and seventy-seven dollars and fifty-five cents, ($177.55.) although a reasonable time for such delivery has long since elapsed.

b. That said defendant Company has failed and refused either to deliver said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the Act of Congress regulating commerce, to the injury and damage of your petitioner in the sum of nine dollars and sixty cents ($9.60).

5th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of Thirty five dollars and eighty four cents, ($35.84). For that on the 20th day of March 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Company, the said articles; to wit: One bale (1) C. Special Cold. Waste 675 po-nds of the value of thirty five dollars and eighty four cents ($35.84); said goods were consigned to W. H. Taylor and
5 Company, Allentown, Pennsylvania, and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that the said Atlantic Coast Line Railroad Company then and there as the initial carrier, undertook and agreed to deliver and transport said goods to said W. H. Taylor and Company at Allentown, Pennsylvania, said goods being then and there an interstate shipment.

a. But although it then and there became the duty of the said defendant Company to transport and deliver said goods to the consignees at Allentown, Pennsylvania, said defendant company has failed to transport and deliver the same to the consignees as aforesaid, although a reasonable time for such delivery has long since elapsed.

b. That the said defendant Company has failed and refused either to deliver said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the Act of Congress regulating commerce, to the injury and damage of your petitioner in the sum of Thirty five dollars and eighty-four cents, ($35.84).

6th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of Ten dollars and nine cents, ($10.09). For that on the 3rd day of April, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Company, the said articles: to wit: Twenty bales (20) White Revellings—22:37 pounds of the value of One hundred and sixty nine dollars and seventy nine cents ($169.79); said goods were consigned to Massasoit Manufacturing Company, New York, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that the said Atlantic Coast Line Railroad Company then and there as the initial carrier undertook and agreed to transport and deliver said goods to said Massasoit Manufacturing Company at New York, N. Y., said goods being then and there an interstate shipment.

6 *a.* But although it then and there became the duty of the said defendant company to transport and deliver said goods

to the consignee at New York, N. Y., said defendant company has failed to transport and deliver the same to the consignees as aforesaid, but out of said shipment have only delivered Nineteen bales (19) of said White Revellings of the value of One hundred and fifty-nine dollars and seventy cents ($159.70), although a reasonable time for such delivery has long since elapsed.

b. That said defendant company has failed and refused either to deliver said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the Act of Congress regulating commerce, to the injury and damage of your petitioner in the sum of Ten dollars and nine cents ($10.09).

7th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of Forty-two dollars and twenty-eight cents ($42.28). For that on the 3rd day of April, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Company, the said articles, to wit: Five bales (5) Waste/576 pounds of the value of forty-two dollars and twenty-eight cents ($42.28); said goods were consigned to Walker Brothers, Brooklyn, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of the bill of lading, and that the said Atlantic Coast Line Railroad Company then and there as the initial carrier, undertook and agreed to deliver and transport said goods to said Walker Brothers, at Brooklyn, N. Y., said goods being then and there an interstate shipment.

a. But although it then and there became the duty of said defendant company to transport and deliver said goods to the consignees at Brooklyn, N. Y.,*a* said defendant company has failed to transport and deliver the same to the consignees as aforesaid, although a reasonable time for such delivery has long since elapsed.

7 *b.* That the said defendant company has failed and refused either to deliver said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the Act of Congress regulating commerce, to the injury and damage of your petitioner in the sum of forty-two dollars and twenty-eight cents ($42.28).

8th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of One Hundred and fourteen dollars and ninety-two cents, ($114.92). For that on the 3rd day of April, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Co., the said articles; to wit: Ten bales (10) No. 35 Stock waste, —2413 pounds of the value of one hundred and fourteen dollars and ninety-two cents; said goods were consigned to New York Cotton Batting Company, Lockport, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that said Atlantic Coast Line Railroad Company then and there as the initial carrier undertook and agreed to transport and deliver said goods to said New York Cotton Batting Company at Lockport, N. Y., said goods being then and there an interstate shipment.

a. But although it then and there became the duty of the said defendant company to transport and deliver said goods to the said consignees at Lockport, N. Y., said defendant company has failed to transport and deliver the same to the consignees as aforesaid, although a reasonable time for such delivery has long since elapsed.

b. That the said defendant company has failed and refused either to deliver the said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the acts of Congress regulating commerce, to the injury and damage of your petitioner in the sum of one hundred and fourteen dollars and ninety-two cents.

8 9th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of forty five dollars and eighty-eigh- cents, ($45.88). For that on June 6th, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Company the said articles, to wit: Fi*b*e bales (5) No. 1. S. White Waste, —625 pounds of the *a*lue of forty-five dollars and eighty-eight cents, ($45.88), said goods were consigned to Walker Brothers, Brooklyn, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of the said bill of lading, and that the said Atlantic Coast Line Railroad Company being then and there the initial carrier undertook and agreed to transport and deliver said goods to said Walker Brother, at Brooklyn, N. Y., said goods being then and there an interstate shipement.

a. But although it then and there became the duty of the said defendant company to transport and deliver said goods to the said consignees at Brooklyn, New York, said defendant Company has f-iled to transport and deliver the same to the consignees as aforesaid, although a reasonable time for such delivery has long since elapsed

b. That said defendant company has failed and refused either to deliver said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the Act of Congress regulating commerce, to the in*f*ury and damage of your petitioner in the sum of forty-five dollars and eight--eight cents. ($45.88).

10th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of twenty dollars and twenty-aine cents ($20.29). For that on the 25th day of June, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Com-

9 pany, the said articles, to wit: Twenty-three bales (23) of waste, —2960 pounds of the value of One hundred and ninety-five dollars and forty-four *n* cents, ($195.44) said goods were consigned to William B. Burke, Rochester, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that said Atlantic Coast Line Railroad Company being then and there the initial carrier, undertook and agreed to transport and deliver said goods to said William B. Burke, at Rochester, N. Y., said goods being then and there an interstate shipment.

a. But although it then and there became the duty of the said defendant company to transport and deliver to the said consignees at Rochester, N. Y., said defendant company has failed to transport and deliver the same to the consignees as aforesaid, but out of said shipment have only *have only* delivered twenty-one bales (21) of said waste of the value of One hundred and seventy-five dollars and fifteen cents ($175.15), although a reasonable time for such delivery has long since elapsed.

b. That the said defendant company has failed and refused either to deliver said goods to the said consignees or to pay your petitioner the value thereof, as they are bound to do under the Act of Congress regulating commerce, to the injury and damage of your petitioner in the sum of twenty dollars and twenty-nine cents ($20.29).

11th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of One hundred and eighty-nine dollars and forty-nine cents, ($189.49). For that on the 19th day of July, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Company the said articles, to wit: Four bales (4) of waste of the *a*value of One hundred and eighty-nine dollars and forty-nine cents, ($189.49); said goods were consigned to International Harvester Company at Auburn, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that said
10 Atlantic Coast Line Railroad Company then and there as the initial carrier, undertook and agreed to transport and deliver said goods to the International Harvester Company at Auburn, N. Y., said goods being then and there an interstate shipment.

a. But although it then and there became the duty of the said defendant company to transport and deliver said goods to the said consignees at Auburn, N. Y., said defendant company has failed to transport and deliver the same to the consignees as aforesaid, although a reasonable time for such delivery has long since passed.

b. That said defendant company has failed and refused either to deliver the said goods to the said consignees or to pay your petitioner the *a*value thereof, as they are bound to do under the Acts of Congress regulating commerce, to the injury and damage of your petitioner in the sum of One Hundred and eighty-nine dollars and forty-nine cents, ($189.49)

12th. That the said Atlantic Coast Line Railroad Company is indebted to your petitioner in the sum of forty-three dollars and ninety-four cents, ($43.94). For that on the 22nd day of July, 1907, your petitioner delivered to the said Atlantic Coast Line Railroad Company, the said articles: to wit: 5 bales No. 1. S. White waste, —615 pounds of the value of forty-three dollars and ninety-four cents, ($43.94), said goods were consigned*d* to International Harvester Company, Newart Valley, N. Y., and for said goods the said Atlantic Coast Line Railroad Company issued to your petitioner a bill of lading, and that your petitioner is now the owner and holder of said bill of lading, and that said Atlantic Coast Line Railroad Company then and there as the initial carrier undertook

and agreed to transport and deliver said goods to said International Harvester Co., at Newart Valley, N. Y., said goods being then and there an interstate shipment.

a. But although it then and there became the duty of the said defendant company to transport and deliver said goods to the consignees as aforesaid at Newart Valley, N. Y., said defendant
11 company has failed to transport and deliver the same to the consignees as aforesaid, although a reasonable time for such delivery has long since elapsed.

b. That said defendant company has failed and refused either to deliver said goods to the consignees or to pay your petitioner the value thereof, as they are bound to do under the Acts of Congress regulating commerce and to the injury and damage of your petitioner in the sum of forty three dollars and ninety fourn cents, ($43.94).

13th. That under the Act of Congress to regulate commerce the defendant company is liable to pay to your petitioner, not only the value of the goods which they have failed to deliver as it was bound to do, but also for a reasonable attorney's fee to be fixed by the Court; and that a reasonable attorney's fees to be allowed your petitioner for counsel fees expended in and about the bringing of this suit is the sum of Five hundred dollars, $500.

Wherefore the premises considered, your petitioner prays judgment against the said Atlantic Coast Line Railroad Company for the sum of Five Hundred and twelve dollars and thirty four cents, ($512.34), for its damages sustained by reason of the failure to deliver said freight or to pay the value thereof, and for the sum of Five hundred dollars attorney's fee; and that process may issue requiring said Atlantic Coast Line railroad Company to be and ap-ear at the next term of the Circuit Court for the Northeastern Division of the Southern District of Georgia, to answer your petitioner's complaint.

(Signed) R. J. SOUTHALL,
Petitioner's Attorney.

12

Process.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

UNITED STATES OF AMERICA,
Northeastern Division, Southern
District of Georgia:

RIVERSIDE MILLS, a Corporation,
versus
ATLANTIC COAST LINE RAILROAD COMPANY, a Corporation.

Complaint.

The President of the United States to the Marshal of the Southern District of Georgia, Greeting:

The defendant Atlantic Coast Line Railroad Company is hereby required, personally or by attorney, to be and appear at the next

term of said Court to be held in the City of Augusta on the third Monday of November next, then and there to answer the plaintiff in an action of complaint as in default thereof, the Court will proceed as to justice shall appertain.

Witness the Honorable Melville W. Fuller Chief Justice of the Supreme Court of the United States at Augusta, in said division and district, this 8th day of November, in the year of our Lord one thousand nine hundred and seven.

(Signed) R. J. SOUTHALL,
Plaintiff's Attorney.

W. H. GODWIN,
Deputy Clerk. [SEAL.]

13 *Marshal's Return of Service.*

UNITED STATES OF AMERICA,
Southern District of Georgia:

I certify that at Augusta, Richmond County, Georgia, within my district, I personally served the within petition and process, on November 8th, 1907, upon the within named Atlantic Coast Line Railroad Company, by handing copies hereof to H. K. Walker, agent of said company, and exhibiting to him the within originals.

The return of

GEORGE F. WHITE,
United States Marshal,
By J. P. MURRAY, *Deputy.*

Dated at Augusta, Georgia, November 9th, 1907.
Filed November 9th, 1907.
W. H. GODWIN, *Deputy Clerk.*

Verdict.

We the jury find for the plaintiff and against the defendant the sum of three hundred and eight and three one hundredth dollars, this January 18th, 1909.

(Signed) JAMES P. RICHARDS, *Foreman.*

Endorsement: In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia. November Term, 1907. Riverside Mills, a corporation, versus Atlantic Coast Line Railroad Company, a corporation. Petition and Process. Filed the 8th day of November, 1907. W. H. Godwin, Deputy Clerk. R. J. Southall, Plaintiff's Attorney.

14 *Defendant's Demurrer.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Now comes the defendant, the Atlantic Coast Line Railroad Company, and doth demur to the petition in the above stated case, and for cause of demurrer, says:—

1. That the provisions of the Statute, to wit: The last two paragraphs of Section 20 of the Act to Regulate Commerce, as amended June 29th, 1906, providing for the issuance of through bills of lading, and making the initial carrier liable for the loss or damage occasioned by the connecting carrier, is unconstitutional, null and void, being in violation of the 5th Amendment to the Constitution of the United States, which provides that: "No person shall be deprived of life, liberty or property without due process of law."

2. That the provisions of the Statute, to wit: The last two paragraphs of Section 20 of the Act to Regulate Commerce, as amended June 29t- 1906, providing for the issuance of through bills of lading, and making the initial carrier liable for loss and damage occasioned by the connecting carrier, is unconstitutional, null and void, being in violation of the 5th Amendment to the Constitution of the United States, which provides that: "No person shall be deprived of life, liberty or property without due process of law;" said Act to regulate Commerce compelling the receiving carrier to issue a through bill of lading, and then making the initial carrier responsible for the Acts of neglects of such connecting carrier, regardless of the solvency, or business ability of such connecting carriet.

15 3. That the 13th paragraph sets out no cause of action, for that, if the eight- section of the Act to Regulate Commerce, in providing for counsel or attorneys fees, applies to a case where the goods are lost, or damaged, by a connecting carrier, the said Section 8 is unconstitutional, null and void, being in violation of the provision of the 5th Amendment to the Constitution of the United States that: "No person shall be deprived of life, liberty or property without due process of law," in that said initial carrier is forced to issue a through bill of lading and penalized, and made to pay attorneys fees, for the acts of neglect of the connecting carrier, without any provision of law by which the attorneys fees paid out by the initial carrier for the default or damage of the connecting carrier shall be recovered in the event the said connecting carrier is insolvent. Defendant says that any requirement in said act by which it could be made to pay attorneys fees, in connection with the loss occasioned on a connecting carrier, could deprive this defendant of its property without due process of law, in violation of the 5th Amendment of the Constitution of the United States.

Wherefore and for divers other good causes of demurrer, this

defendant doth demur to the petition in the above stated case, and prays the judgment of the Court whether it shall be compelled to make any further or other answer to said petition.

(Signed) J. R. LAMAR,
Attorney Atlantic Coast Line Railroad Company.

STATE OF GEORGIA,
Richmond County:

Personally appeared H. R. Walker, who, being first duly sworn, deposes and says that he is the agent of the Atlantic Coast Line Rail-Road Company, in the City of Augusta, in the Northeastern Division of the Southern District of Georgia, and that the foregoing demurrer is not interposed for delay.

(Signed) H. R. WALKER.

Sworn to and subscribed before me, this March 21st, 1908.

(Signed) GEO. R. COFFIN,
Notary Public, Richmond County, Georgia.

16 I hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

(Signed) J. R. LAMAR,
Attorney for Atlantic Coast Line Railroad Company.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Demurrer of Atlantic Coast Line Railroad Company. Filed in office this 21st day of March, 1908, Sam. F. Garlington, Deputy Clerk. J. R. Lamar, Attorney for Atlantic Coast Line Railroad Company.

17 *Order Overruling Demurrer.*

In the Circuit Court*b* of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS, a Corporation,
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Complaint for Damages.

After hearing the argument of counsel it is considered, ordered and adjudged by the Court that the demurrer filed by the defendants in the above entitled cause be, and the same is hereby overruled.

In open Court this January 14th, 1909.

(Signed) EMORY SPEER,
United States Judge.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Order overruling demurrer. Filed in office this January 14th, 1909, 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

18 *Order Allowing Exceptions.*

In the United States Circuit Court, Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Be it known that on this 14th day of January, 1909, the defendant's demurrer to the plaintiff's petition having been, by the Court, overruled, and the defendant having then and there excepted to the order of the Court overruling said demurrer, said defendant's exceptions are duly allowed and this bill of exceptions settled and allowed.

Done in open Court this January 14, 1909.

(Signed) EMORY SPEER, *Judge.*

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Order allowing exceptions. Filed in office this January 14th, 1909, 2 o'Clock, P. M., W. H. Godwin, Deputy Clerk.

19 *Defendant's Answer.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Now comes the defendant, the Atlantic Coast Line Railroad Company, by its attorney, J. R. Lamar, and subject to its demurrer already filed, for answer to the petition in the above stated case, says:

1. The defendant admits the allegations in paragraphs 1, 2, 3;

2. Defendant admits the receipt of the goods referred to in paragraphs 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the petition;

3. But defendant denies the legal conclusion therein set forth and denies that it is liable to the plaintiff therefor; and

4. Avers that it promptly delivered the said goods to a connecting carrier at Pinners Point or at Richmond, Virginia, and avers that if the said goods were lost or damaged, it was by the connecting carriers between Pinners Point and destination, or by connecting carriers between Richmond, Virginia, and the point of destination;

5. Defendant denies the allegations in paragraph 13, and also denies that it is liable for the attorneys fees incurred by the Plaintiff in this cause.

6. For plea, defendant says that after receiving the goods referred to in the petition, it promptly and safely transmitted the same over

defendant's line, and with all due dispatch and dilligence,
20 promptly and safely delivered the same to connecting carriers, whereby the defendant fully performed and discharged its contract of carriage, and fully performed its liability at common law, and fully performed all valied statuotory liabilities.

7. Defendant avers that it is not liable for the loss or damage of the said goods occasioned by the acts of omission or commission of the common carriers to whom the said defendant delivered the said goods as it had contracted to do.

8. For further plea, defendant says that the clause of Section 20 of the Act to regulate commerce, amended June 29th, 1906, commonly known as the Hepburn Bill, providing for the issuance of through bill of lading making the initial carrier liable for loss or damage occasioned by the connecting carrier, is unconstitutional, null and void, and in violation of the 5th Amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

9. For further plea, defendant says that plaintiff ought not to have and maintain its said suit, because defendant says that it is not guilty of the wrongs and injuries alleged against it in the plaintiff's said petition, and of this, the defendant puts itself upon the country.

10. For further plea, the defendant says that the through bill of lading, covering each of the shipments referred to in the petition and issued by defendant to plaintiff, and received and accepted by the plaintiff contained a stipulation;

a. That no carrier shall be liable for loss or damage not occur-ing on its portion of the route;

11. Defendant avers that said provision is valid, and a binding contract, and that the provision in the said Hepburn Bill
21 declaring such limitation is null and void, because in violation of the 5th Amendment to the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law; the said provision of the Hepburn Act depriving defendant of a right of contract in violation of said fifth Amendment, and making defendant liable for the act of a third person, thereby taking defendant's property without due process of law.

12. Defendant further avers that the provision of the Hepburn Act requiring defendant to issue a through bill of lading, and then make defendant liable for the act of a connecting carrier, is unconstitutional, and in violation of the 5th Amendment to the Constitution of the United States, which provides that no person shall be deprived of life, liberty or property without due process of law.

(Signed) J. R. LAMAR,
Attorney for Defendant.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Answer of Defendant. Filed in office January 18th, 1909, W. H. Godwin, Deputy Clerk.

22 *Opinion of the Court.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Action for Damages.

Demurrer upon Ground of Violation of the 5th Amendment of Constitution, Depriving or Property without Due Process of Law.

R. J. Southall and Alex. Akerman for plaintiff.
Joseph Lamar for defendant.

Opinion of the Court, January 14th, 1909.

SPEER, *Judge* (orally):

So clear are my own convictions about this question, also in view of its immediate importance, that perhaps I should not for the sake of attempting anything like a- *nct* opinion, delay a decision in the case by taking it under advisement.

For a very long period of our history, Congress, although authorized by the organic law to regulate commerce between the states, failed to make any very valuable or substantial action relating to that great topic. The marvelous development of our interstate and foreign commerce, the multiplication of great railroads, the combinations of these railroads into vast systems, the enormous power which was thus accumulated by the railroads, and the helplessness of the shipper in his conflict with these systems resulting from such accession of power, pressed upon the minds of the members of the National Legislature. Looking then to the letter of the organic law, they found the authority to enact legislation of this general character. The Interstate Commerce Commission was created. Numerous amendments to the original law were made. These were not, however, regarded as sufficient, and this bill, which because of the name of its distinguished author is called the "Hepburn Bill," was enacted.

Under this provision the action is brought. It is an action
23 in behalf of the Riverside Mills, a corporation of this city, against the Atlantic Coast Line Railroad. The complaint is that the plaintiff shipped a quantity of its product to points beyond the destination of this railroad and that the goods were not delivered. No payment has been made for them by the consignees, and redress is sought by recourse to and action based upon the provisions of the "Hepburn Bill," which is as follows:

"That any common carrier, railroad or transportation company, receiving property for transportation from a point in one State to

a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property cause- by it or any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed."

This is as I understand it, but the converse proposition of what has long been the law in our own state. If a shipment comes to this State over the lines of connecting railways, and a default or loss is occasioned anywhere by the negligence of one of the railway connections of a line within our State, it may result, if I am not incorrect in my recollection, in an action against the railroad whose terminal is here, and which last received the goods as in good order. Instead of making the last railroad responsible, with equal force and justice, Congress has reversed the process, which the Legislature of Georgia long ago fixed and which has been recognized as the law within this state since that statute was enacted.

Where is the wrong in it? It is said that the initial carrier is obliged to give a bill of lading in violation of due process of law. Why so? When suit is brought against him, he is entitled to his day in Court. He can deny that the bill of lading was given, or that the freight was received. He can make any proper defense which may be made in a court of law, and which any other connecting carrier might make wherever the goods are transported or wherever the loss or injury occurred. If the loss occurred from the act of God or from the Country's enemies, for instance on a section of these intra-communicating lines somewhere between here
24 and *and* the point of destination, or was otherwise capable of defense, this railroad would have the privilege of making such defense here.

By the Act of Congress the shipper is afforded an inexpensive and convenient tribunal, in which to seek enforcement of his rights. When we consider the great extension of railroad connections, and the thousands of miles of distance which they comprehend, in the absence of this provision, how helpless would be a shipper here if he should attempt to ship his products to the Pacific Coast, and they should be injured or lost for instance, on the Oregon Short Line. The railroads have every facility for deriving all the information in regard to the claim. They daily settle and determine thousands of claims between themselves. Where there is a controversy between a single individual and many corporations, with such power and such opportunities, how hopeless is he who is compelled to go to a foreign jurisdiction, when the railroad fare there might more than offset his profits. Congress has acted wisely. It has brought the Courts to the door of the shipper. It has bent a listening ear, and heard his complaints. He is afforded the necessary protection of the law, a speedy and cheap trial.

What is the power to "regulate interstate commerce?" Commerce has been defined many times by the Supreme Court. Per-

haps the definition of Mr. Justice Johnson in 9 Wheaton, page 23 of the Law edition, is as good as any other.

"Commerce," he said, "in its simplest signification, means an exchange of goods; but in the advancement of society, labor transportation, intel-igence, care, and various mediums of exchange, become commodities, and enter into commerce. The subject, the vehicle, the agent, and the various operations become the objects of commercial regulation."

We have seen that Congress can regulate the vehicle of commerce and the essentials of that vehicle. It can regulate the proof of the passage of pos-session, the bill of lading, and it requires that the bill of lading shall be delivered by the initial road to the shipper. What could be more obvious than this necessity? The initial carrier receives the goods from the shipper and inspects them. Best of all, it has the opportunity to speak as to their character, and
25 the method of ascertaining their value. It charges freight on the entire transaction. It "gets the business," as is said, that might be sent over any other road. The common carriers have been given great privileges by the public, among others the right of eminent domain. All the agencies of government are made for its protection. If undue reductions of rates are attempted by State authorities, the carrier at once resorts to the United States Courts, and obtains relief. That relief is ratified by the Supreme Court of the United States. The carrier is the great agent of society, and in the acceptance of that agency, it has received such enormous benefits that it is compelled to submit to those regulations which society finds it necessary to place around it for the protection of the public generally.

To my mind it is amazing that our Government had so long failed to enact this law. I differ toto coelo with my gifted friend, Judge Lamar, and must overrule the demurrer.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills versus Atlantic Coast Line Railroad Company. Opinion of Court. Filed in office this April 3rd, 1909, W. H. Godwin, Deputy Clerk.

26 *Verdict.*

"We the Jury find for the plaintiff and against the defendant the sum of three hundred and eight dollars and three one hundredth- dollars, this January 18th, 1909.

(Signed) JAMES P. RICHARDS, *Foreman.*

Final Decree, Judgment, etc.

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

The Jury in the above stated case having returned a verdict for the plaintiff for three hundred and eight dollars and three cents, ($308.03), it is ordered, considered, and adjudged, that the plaintiff have and recover from the defendant the sum of three hundred and eight dollars and three cents ($308.03), principal, with interest thereon, at the rate of seven per cent (7%) per annum, from the date of this judgment, and all costs of the suit to be taxed by the Clerk, including the sum of One Hundred dollars, as attorney's fees, which sum the Court finds to be a reasonable Attorney's fee, and orders that the same be taxed as part of the costs in said case.

This 2nd day of April, 1909.

(Signed) EMORY SPEER,
United States Judge.

R. J. Southall, Akerman and Akerman, Plaintiff's Attorneys.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Final Decree, Judgment, etc. Filed in office this April 3rd, 1909, 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

27 *Opinion of the Court.*

In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Action for Damages under Hepburn Act.

Claim for Attorney's Fees under Section 8 of the Act.

R. J. Southall, and Alexander Akerman, for Plaintiff.
Joseph R. Lamar, for defendant.

(*Opinion of the Court, April* 2, 1909.)

SPEER, *Judge:*

The question before the Court is briefly this. Where connecting lines of railways, engaged in interstate commerce, shall fail to trans-

port property, which they have received and for the transportation of which they have been paid, and also fail and refuse for an unreasonable time to pay the shipper the loss thus sustained, is the court authorized by the provisions of the Act of Congress, approved June 29th, 1906, known as the "Hepburn Act", to allow in its judgment reasonable attorney's fees to the shipper and against the offending companies?

The precise question in issue has not been determined by a Court of paramount authority. In the case now under consideration, the constitutionality of the entire Act has been vigorously assailed, but the validity of the Act and the liability of the defendant company have been sustained. A decree, directing a recovery of some $300. for its goods shipped in interstate trade over the defendant's connecting lines, has been entered. The liability of the defendant company for the reasonable fee of the plaintiff's attorneys remains to be determined. The construction necessary for decision involves the following clauses of the Act. Section 20 provides:

28 "That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed:

Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

Section 8 of the Act is as follows:

"That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done, any act matter or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this Act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this Act, together with a reasonable attorney's fee, to be fixed by the Court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case."

In the proper interpretation of these clauses we may utilize the familiar rule, and search for the old law, the mischief, and then for the remedy which Congress has attempted to provide. The liability of the common carrier (and this is not restricted to railroads) for the failure to deliver or pay for goods entrusted to it for transportation for hire was fixed by the common law. That law, however, was not sufficient to redress the wrongs of shippers, sustained on modern lines conveying interstate commerce. The loss of the commodities belonging to "David Copperfield" and "Peggotty", carried by "Mr. Barkis" from Blunderstone to Yarmouth

in his wagon, or "the red bag, the striped bag, brown paper parcel, and the leather hat-box", transported by the elder "Weller" for "Mr. Peter Magnus" in the boot of the former gentleman's coach from the "Blue Inn", Whitechapel to the "Great White Horse Inn" at Ipswich, might perhaps have been readily recoverable. It is quite different, however, we may say, with regard to a shipment of cotton goods from the Riverside Mills, in Augusta, to Seattle
29 or San Francisco, over the many connecting railways spanning the continent. The countless losses of such shipments, and their important values became an incalculable injury to the shippers and a burden upon their business. The failure to speedily adjust such losses became the chief contributing cause of this injury to the shipper. Official reserve and official indifference, amounting at times to that "insolence of office" the chiefest of those "spurns which patient merit of the unworthy takes", often greeted the efforts of business men and others to obtain redress. Every shipper of consequence, every practicing attorney holding claims arising from such delinquencies, every Judge trying such claims, can readily recall the circumlocution, and the consequent insufferable delay in the adjustment of claims of the plainest character. When their loss was sustained, we may presume that the claim would be made to the agent of each railroad to the point of destination. Each claim, it seems, must be apparently scrutinized often by more than one department of each successive railroad extending from the point of delivery to the point of destination. It did not matter how many railroads there might have been, how great the distance, how long the time consumed, how unreasonable the delay, how injurious the loss. Each employee with relating duties must at his leisure contemplate the claim in every light of which it was capable, write the result of his discoveries thereon, and forward it to the agent of the connecting line, or to all of the agents of each of the connecting lines. In the meantime, the shipper was suffering the accumulating injury resulting from the loss of his goods, the interruption of his business, the deprivation of the interest on the sum involved, and possibly the loss of other business from the disappointed and exasperated customer, attending the slow return of the now bulky file. At length, after the obviously just demand had been leisurely scrutinized by all the "Tite Barnacles" of this unprecedented circumlocution, the shipper had usually to content himself with a curt refusal to pay anything. Happily for him, however, Congress has opened the National Courts for his
30 claim, no matter how small the amount, and in order to impart some degree of celerity to the mental or meditative activities of the "Tite Barnacles" aforesaid, the penalty of reasonable attorney's fees, to be fixed by the Court, is also granted by the law.

In the absence of such a penalty, the small shipper, notwithstanding the wise purposes of the National legislation, would have been helpless. Take a case like that before the Court, which has been fought at every step here, and which we are now advised by the bill of exceptions presented will be carried to the Supreme Court of the

United States in order to test the authority of Congress to enact such legislation. The amount involved is only $300, and the Riverside Mills, although a prosperous factory, had ordinarily better suffer the loss rather than pay even the moderate amount of attorney's or counsel fees proper in such a case. If, however, the railways, whose negligence under the agreed state of facts occasioned the loss and refused adjustment, must pay the attorney's fees, not only will the plaintiff safely and inexpensively press his remedies for righteous redress, but the result of litigation will have a most salutary effect on the officials of those corporations, who for hire transport in interstate commerce the products of the people. While this provision of law may, therefore, encourage shippers to institute litigation, it will in a short time have the effect of preventing that negligence which renders such litigation possible.

The principle of the statute has been fully upheld by the Supreme Court of the United States in the Seaboard Air Line Railway versus Seegers, 207 U. S. 73. There the State of South Carolina had attached a penalty of $50, to each failure of a railroad company engaged in intrastate commerce to pay a claim for loss or damage with 40 days after the filing of the same, and where there was a recovery of the full amount claimed. The goods shipped in that case were a bunch of bananas, and the freight charges were only $1.75, whereas the penalty sued for was $50. This difference, says Mr. Justice Brewer, "naturally excites attention." But
31 the learned Justice added "We are of the opinion that this case comes within the limit of constitutionality. The object of the statute was not to penalize the carrier for merely refusing to pay a claim in the time required, whether just or unjust, but the design was to bring about a reasonably prompt settlement of all proper claims, the penalty, in case of a recovery in court, operating as a deterrent of the carrier in refusing to settle just claims, and as compensation of the claimant for the trouble and expense of the suit which the carriers unreasonable delay and refusal made necessary." The learned Justice further points out the fact that "the matter to be adjusted is peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed." On the other hand, we may add that the shipper does not know what has become of his goods, and the consignee is equally uninformed. "It may be stated as a general rule," said Justice Brewer, "that an act which puts in one class all engaged in a business of a special and public character, requires of them the performance of a duty which they can do better and more quickly than others, and imposes a not exorbitant penalty for the failure to perform that duty within a reasonable time, cannot be adjudged unconstitutional as a purely arbitrary classification." Holding that "the purpose of the legislation" was primarily "to compel the performance of duties which the carrier assumes when it enters upon the discharge of its public functions," the Supreme Court of the United States sustained the validity of the South Carolina legislation upon this subject.

Now, what a state may do within the regulation of intrastate traffic, Congress may do in the regulation of that which is inter-

state. For the reason, then, that the mischief sought to be avoided was the unreasonable delay and the arbitrary refusal to pay just claims, we must conclude that Congress, when it authorized, in the case of a recovery under this great Act to further regulate the vital business of transportation in interstate commerce, the taxation by the Court of a reasonable attorney's fee as a part of the costs of litigation, was clearly within its authority. For these reasons, the Court will allow a fee of One Hundred dollars for the plaintiff's attorneys.

32 Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Opinion of the Court. Filed April 3rd, 1909, W. H. Godwin, Deputy Clerk.

Bill of Exceptions, etc.

United States Circuit Court for the Northeastern Division, Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Be it remembered that during the November Term, 1908, the above entitled action came on regularly January 14, 1909, to be heard before the Honorable Emory Speer, District Judge, sitting in, and holding the above entitled Circuit Court: R. J. Southall, Esquire, and Alexander Akerman, Esquire, appearing for the plaintiff: and Joseph R. Lamar, Esquire, appearing as attorney for the defendant.

A demurrer having been regularly filed at the first term, the said demurrer came on for argument: and, after argument, the Court overruled the same: and the defendant having then and there excepted to the order of the Court overruling said demurrer, said defendant's exceptions were duly allowed, and the bill of exceptions settled and allowed in open Court on the 14th day of January, 1909, which said bill of exceptions is a part of the record in said cause, and is in the following words:

In the United States Circuit Court, Northeastern Division of the Southern District of Georgia.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Be it known that on this 14th day of January, 1909, the defendant demurrer to the plaintiff's petition having been, by the Court, overruled and the defendant having then and there excepted to
33 the order of — Court overruling said demurrer, said defendant's exceptions are duly allowed and this bill of exceptions settled and allowed.

Done in open Court, this January 14th, 1909.

EMORY SPEER, *Judge.*

Thereafter, a jury was duly empaneled, and sworn to try said cause, whereupon the following proceedings were had, to wit:

It was stated in open court that the respective parties acting through their respective counsel, had entered into a stipulation containing the following:

Agreed Statement of Facts.

In the case of the Riverside Mills, versus the Atlantic Coast Line Railroad Company, now pending in the United States Court, for the Northeastern Division of the Southern District of Georgia, it is mutually agreed by the parties, acting in this respect by their respective counsel, that:

The Atlantic Coast Line Railroad Company received the goods referred to in the petition at the respective dates therein alleged, and that the goods were of the value named in the petition.

That the goods of the value of $9.60 consigned to the Chesapeake Steamship Company, of Baltimore, (Paragraph 4), and goods of the value of $35.84, (Paragraph 5), consigned to W. H. Taylor and Company, of Allentown, Pennsylvania, were never delivered to the consignee, or to the connecting carrier: The Atlantic Coast Line is liable for the loss of said goods, and hereby tenders the sum of $50.00, being the principal and interest for said items; the said sum of $50.00, is accepted by the defendant as a credit on the claim presented by him in the petition aforesaid, without interfering with its right to costs, or otherwise to press the suit.

That goods to the value of $43.94, consigned to International Harvester Company, Newart Valley, New York, (Paragraph 12 of the petition) were lost or damaged, but the value thereof has been paid by the Atlantic Coast Line, and no claim is now made in this suit for the value thereof.

34 That goods of the value of $114.92, consigned to New York Cotton Batting Company, Lockport, New York, (Paragraph 8), were delivered by the Atlantic Coast Line to the connecting carrier, by whom it was delivered to the consignee, and the plaintiff dismisses and withdraws any claim for said sum of $114.92.

That goods of the value of $10.09, consigned to Massasoit Manufacturing Company, New York, New York, (Paragraph 6), and goods of the value of $42.28, consigned to Walker Brothers, Brooklyn, New York, (Paragraph 7); and goods of the value of $45.88, consigned to Walker Brothers, Brooklyn, New York, (Paragraph 9), were tendered to the Atlantic Coast Line, and through bills of lading demanded therefor by the Riverside Mills; that said through bills of lading were issued on the dates named in the petition; the goods, in usual and due course, shipped over the Atlantic Coast Line, to its terminals at Pinner's Point, Virginia, where the said goods were duly delivered to the Old Dominion Steamship Company, a connecting carrier, but by the neglect and default of the old Dominion Steamship Company, were not delivered to the consignee.

That goods of the value of $20.29, consigned to William B. Burke, Rochester, New York, (Paragraph 10); and goods of the value of

$189.49, consigned to the International Harvester Company, at Auburn, New York, (Paragraph 11), were tendered by the Riverside Mills to the Atlantic Coast Line Railroad Company, and through bills of lading demanded therefor. That such through bills of lading were issued on the dates named in the petition, and the said goods respectively forwarded over the line of the Atlantic Coast Line to its terminal at Richmond, Virginia, and there, in due course, promptly delivered to a railroad company engaged in interstate shipment, and a connecting carrier with the Atlantic Coast Line Railroad Company;

That said goods, while in the possession of said connecting carrier, or while in possession of a subsequent connecting carrier, were lost, and were never delivered to the consignees named — the bills of lading.

35 That the Riverside Mill made constant and frequent shipments over the Atlantic Coast Line, and had a blank form of receipt, like the attached, marked "A," which the Riverside Mill filled out, showing what goods it had loaded into cars and the name of the consignee; said receipt containing a stipulation that the shipment is "per conditions of the company's bill of lading," and that the Atlantic Coast Line Railroad Company, on said receipts prepared by the Riverside Mill, issued, for each of the shipments hereinbefore referred to, bills of lading on forms like that attached, marked exhibit "B."

It is further stipulated and agreed, that in allowing credits hereinbefore referred to, that the value of the remaining merchandise is $308.03, and that said goods of the value of $308.03 were in due course delivered by the Atlantic Coast Line Railroad Company to connecting carriers, but that the said goods so delivered to the connecting carriers were not delivered by them to the consignee, but that said goods, while in possession of connecting carriers, between the Atlantic Coast Line Railroad's terminal points and destination, were lost through the negligence of the said connecting carriers.

All of said connecting carriers were engaged in interstate commerce, and were not under the management and control of the Atlantic Coast Line Railroad Company.

The goods lost by the Old Dominion Steamship Company were routed over the same in the receipt prepared by the Riverside Mill, being marked "Via. Atlantic Coast Line.—Old Dominion."

The goods lost between Richmond, Virginia, and destination, were not routed by the Riverside Mills, being marked "Via. Atlantic Coast Line."

All shipments referred to were sent collect,—no freight on any of the shipments being prepaid by the Riverside Mills.

It is admitted that the Riverside Mills is the owner and legal holder of the bills of lading referred to in the petition—covering the goods above referred to, and that the said bills of lading were in form like that attached.

(Here follow Bills of Lading, Exhibits A and B, and reverse side of Exhibit B, marked pp. 36, 37 and 38.)

Exhibit A

ORIGINAL.

Received from

RIVERSIDE MILLS,

Augusta, Ga., 190

By A. C. L. R. R. *R. R. Co.*,

In apparent good order, the articles named below, to be delivered in like good order, without unnecessary delay,

To

At

Via

Marks

AS PER CONDITIONS OF COMPANY'S BILL OF LADING.

No.	ARTICLES.	WEIGHT. Sub. to Cor'ctn.	Rate of Freight per 100 lbs.
	Bales Batting		
	Cases Batting		
	Bales Cotton Waste		
	Bales Old Bagging		
	Rolls Pieced Bagging		
	Bales Cotton Factory Sweepings (Value limited 4 cts. per pound)		
	Refuse Cotton Spinning Factory (Value limited 4 cts. per pound)		

Car Nos.	Initial	Car Nos.	Initial
"	"	"	"
"	"	"	"
"	"	"	"
"	"	"	"
"	"	"	"
"	"	"	"

Blank Issued (Printed) by Southern Aeronautic Register Co., Memphis, Tenn.

No. 12684

Agent.

Exhibit "B"

Form 156.

Atlantic Coast Line Railroad Company

BILL OF LADING.

NOTE.—The shipper may elect to accept the conditions printed on the face and back hereof, and the reduced rates applying thereunder, or may, as provided below, require the carriage of the property at carrier's liability.

If the shipper elects not to accept the said reduced rates and conditions, he should so notify the agent of the receiving carrier, in writing, at the time his property is offered for shipment, and if he does not give such notice it will be understood that he desires the property carried subject to the Standard Bill of Lading conditions in order to secure the reduced rate thereon. Property carried not subject to the conditions of the Standard Bill of Lading will be at the carrier's liability, limited only as provided by Common Law, and by the laws of the United States, and of the several States, in so far as they apply. Property thus carried will be charged twenty (20) per cent. higher (subject to a minimum increase of one (1) cent per hundred pounds) than if shipped subject to the conditions of the Standard Bill of Lading.

Received by ATLANTIC COAST LINE RAILROAD COMPANY,

at _____ Station _____ 190__

from _____ the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said carrier agrees to carry to said destination, if on its own road, or otherwise to deliver to another carrier on the route to said destination.

In consideration of the rate charged under the conditions of this Bill of Lading, it is mutually agreed as to each carrier, severally, but not jointly, of all or any of said property over all or any portion of said route to destination, and as to each party at any time in erested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, on the face or back hereof, all of which are agreed to by the shipper as owner, or agent for the owner, and accepted for himself or his assigns as just and reasonable.

MARKS AND NUMBERS.	ARTICLES.	WEIGHT. (Subject to Correction.)
Consignee _____		
DESTINATION. *Place* _____		
County _____		
State _____		
Consignee's address as information only and not for purposes of delivery _____		
Route _____		

Charges advanced, $ _____

and _____ $ _____ *Agent.*

(The Signature of the Agent here acknowledges only the receipt of the property, and the charges advanced, if any.)

THE BLANK SPACES BELOW MUST NOT BE FILLED UP BY THE SHIPPER.

The rate of freight from _____ *to* _____ *is in cents:*

PER ONE HUNDRED POUNDS.

If Times 1st Class	If 1st Class	If 2nd Class	If 3rd Class	If 4th Class	If 5th Class	If 6th Class	If Class A	If Class B	If Class C	If Class D	If Class E	If Class H	Per Barrel If Class F	Per _____ If SPECIAL

_____ *Agent.*

(The signature of the Agent here acknowledges only the rate given.)

Received $ _____ *to apply in prepayment of the charges on the property described above.*

_____ *Agent.*

(The signature of the Agent here acknowledges only the amount prepaid.

(OVER)

NOT NEGOTIABLE

If the word "ORDER" is written immediately before or after the name of the party to whose order the property is consigned, the surrender of the Bill of Lading, properly endorsed, will be required before the delivery of the property at destination, as provided by section 8 on the back hereof.

Reverse side Exhibit "B"

Atlantic Coast Line Railroad Company.

J. W. PERRIN, Gen'l Freight Agent, 1st Div., Wilmington, N. C.

JAMES MENZIES, Gen'l Freight Agent, 2nd Div., Savannah, Ga.

A. H. SHEPPARD, Freight Claim Agent, Wilmington, N. C.

R. A. BRAND, Freight Traffic Manager, Wilmington, N. C.

CONDITIONS.

1. No carrier or party in possession of all or any of the property herein described shall be liable for any loss thereof or damage thereto by causes beyond its control; or by floods, fire, jettison, ice, collision, delay or quarantine; or by robbers, riots, strikes or stoppage of labor; or by leakage, breakage, chafing, loss in weight, decay, vermin, changes in weather, heat, frost or wet; or for country damage on cotton; or from any cause, if it be necessary or is usual to carry such property upon deck or upon open cars.

2. No carrier is bound to carry said property by any particular train or vessel, or in time for any particular market, or, otherwise than with as reasonable despatch as its general business will permit. Every carrier shall have the right, in case of necessity, to forward said property by any carrier between the point of shipment and the point to which the rate is given. All additional risks and increased expenses incurred by reason of change of route in cases of necessity, shall be borne by the owner of the goods, and be a lien thereon.

3. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under this bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be the maximum price to govern such computation. Claims for loss or damage must be made in writing to the agent at point of delivery promptly after arrival of the property, and if delayed for more than thirty days after the delivery of the property, or after due time for the delivery thereof, no carrier hereunder shall be liable in any event.

4. All property shall be subject to necessary cooperage, baling and repairs at owner's cost. Each carrier over whose route Cotton is to be carried hereunder shall have the privilege of compressing the same, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is an elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of same kind, without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder. No carrier shall be liable for differences in weights or for shrinkage of any grain or seed carried in bulk.

5. Property not removed by the person or party entitled to receive it within twenty-four hours after its arrival at destination, may be kept in the vessel, car, depot, or place of delivery of the carrier, at the sole risk of the owner of said property, or may be, at the option of the carrier, removed and otherwise stored at the owner's risk and cost, and there held subject to lien for all freight and other charges. The delivering carrier may make a reasonable charge per day for the detention of any vessel or car and for use of track after the car has been held forty-eight hours for unloading, and may add such charge to all other charges hereunder, and hold said property subject to a lien therefor. Property destined to or taken from a station or wharf at which there is no regularly appointed agent, shall be entirely at the risk of owner when unloaded from, or until loaded into, car or vessel; and when received from or delivered on private or other sidings or wharves, shall be at owner's risk until the cars are attached to, and after they are detached from trains, or until loaded into, and after unloaded from, vessel.

6. No carrier hereunder will carry or be liable in any way for any document, specie, or for any article of extraordinary value not specifically rated in the published classifications, unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

7. Every party, whether principal or agent, shipping inflammable, explosive, or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense, or destroyed without compensation.

8. If the word "Order" is written hereon immediately before or after the name of the party to whose order the property is consigned, without any condition or limitation other than the name of a party to be notified of the arrival of the property, the surrender of this bill of lading properly endorsed shall be required before the delivery of the property at destination. If any other than the aforesaid form of consignment is used herein, the said property may, at the option of the carrier, be delivered without requiring the production or surrender of this bill of lading.

9. Owner or consignee shall pay freight and average, if any, and all other charges accruing on said property before delivery, and according to weight as ascertained by any carrier hereunder; and if upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped, and at the tariff rates, and under the rules provided for by published classification.

10. This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, each of which is to be bound by and have the benefits of the provisions thereof, and in accepting this bill of lading the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all of its stipulations, exceptions and conditions, whether printed or written.

11. If all or any part of said property is carried by water such water carriage shall be performed subject to statutory acts and to all the conditions, whether printed or written, contained in this bill of lading, including the condition that no carrier by water shall be liable for any loss or damage resulting from explosion, accidents to boilers or machinery, or from any latent defects in hull, machinery or appurtenances, existing before, at the time, or after shipment or sailing on the voyage, or unseaworthiness, provided the owners have exercised due diligence to make the vessel seaworthy; nor shall negligence be presumed against any carrier.

The carrier shall have liberty to transfer, to transship, to lighter, to call at any port or ports, to tow or be towed, to deviate, to assist vessels in distress, to navigate without pilots, and to load and discharge goods at any time.

If goods are landed by agreement between any of the parties hereto and carrier at any other than the regular wharf, stations or landing of the carrier, each separate package or article shall be at the risk of the owner immediately upon such discharge.

It is agreed that if any goods are sold short of ultimate destination, each carrier that has completed his part of the transportation shall have earned his agreed upon proportion of the through freight, and the same, with the charges advanced, shall be due and payable out of the proceeds thereof; and for any distance carried, each carrier shall, on the same basis, have earned and be entitled to freight, with charges advanced, for such part of the transportation as has been accomplished.

12. In case of quarantine the goods may be discharged at risk and expense of owners into quarantine depot, or elsewhere, as required by quarantine regulations or authorites, or for the carrier's despatch, or at nearest available point in carrier's judgment, and in any such case carrier's responsibility shall cease when goods are so discharged, or goods may be returned by carriers at owner's risk and expense to shipping point, earning freight both ways. Quarantine expenses, of whatever nature or kind, upon or in respect to goods, shall be borne by the owners of the goods, or be a lien thereon. The carrier shall not be liable for loss or damage occasioned by fumigation or disinfection or other acts required by quarantine regulations or authorities even though same may have been done by carrier's officers, crew, agents or employees, nor for detention, loss or damage of any kind occasioned by quarantine or the enforcement thereof.

13. Any alteration, addition, or erasure in this bill of lading, which shall be made without the special notation hereon of the agent of the carrier issuing this bill of lading, shall be void.

NOT NEGOTIABLE.

39 The foregoing statement of facts being made subject to the right of the defendant to insist that under said facts the Atlantic Coast Line Railroad Company is not liable to the plaintiff for said facts, and that the provisions of the Hepburn Act, requiring the initial carrier to issue a through bill of lading, and making the initial carrier liable for the acts, negligence or default of the connecting carrier, and presenting a contract exempting the initial carrier from liability beyond its line, are void, and in violation of the Fifth Amendment to the Constitution of the United States, providing that no person shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use, without just compensation.

January 15, 1909.

J. R. LAMAR,
Attorney for the Atlantic Coast Line Railroad.
R. J. SOUTHALL,
ALEXANDER AKERMAN,
Attorneys for Riverside Mill.

Said agreed statement of facts was introduced in evidence and read to the Jury.

This concluded the testimony. No other testimony beyond the agreed statement of facts was offered by either party.

Whereupon, and at the close of the testimony, both parties rested, and the cause was argued to the jury by counsel for the respective parties.

After argument, and before the Court charged the jury, counsel for the defendant moved the Court to instruct the Jury to find a verdict for the defendant, upon the following grounds:

1. Because on the evidence, and in view of the provisions of the Fifth Amendment to the Constitution of the United States that "No person shall be deprived of property without due process of law," the defendant is entitled to a verdict in its favor.

2. Because it affirmatively appears that the defendant has accounted for all goods, except those named in the agreed statement of facts, of the value of $308.03, and that such goods of the value of $308.03 received by the Atlantic Coast Line, were duly
40 delivered to the connecting carriers, and that said goods of the value of $308.03 were lost or damaged by the connecting carrier, and that to make the Atlantic Coast Line Railroad Company liable for the acts of omission, or commission, of such connecting carrier, or for failure to deliver the same to the consignee, is to deprive the said Atlantic Coast Line Railroad Company of its property without due process of law, and in violation of the provision of the Fifth Amendment to the Constitution of the United States, which declares that: "No person shall be deprived of life, liberty or property without due process of law."

Which said motion to direct a verdict for the defendant was overruled by the court and to which ruling the defendant then and there in the presence of the jury, duly excepted, and hereby tenders

to the Court, this its bill of exceptions, to sign, and seal, and the Court does hereby sign and seal the same.

Thereupon the cause proceeded and the plaintiff, on the agreed statement of facts, moved the court to direct a verdict for the plaintiff for $308.03 to which the defendant objected on the grounds following:

1. Because in view of the provisions of the Fifth Amendment to the Constitution of the United States, the plaintiff under the agreed statement of facts, is not entitled to recover a verdict for $308.03 or for any sum;

a. Because it affirmatively appears that all the goods not accounted for aggregate $308.03, and that such goods were not lost, or damaged, by the Atlantic Coast Line Railroad Company, but by connecting carriers, after the said goods had been delivered to said connecting carriers by the Atlantic Coast Line Railroad Company, and that to make the Atlantic Coast Line Railroad Company liable for the acts of omission or commission, of such connecting carrier, or for failure to deliver the same to the consignees, it to deprive the said Atlantic Coast Line Railroad of its property, without due process of law, and in violation of the provisions of the Fifth Amendment to the Constitution of the United States which declares that: "No person shall be deprived of life, liberty or property without due process of law."

b. That the provisions of the Statute popularly known
41 as the Hepburn Bill, to wit: The last two paragraphs of Section 20 of the Act to regulate commerce, as amended June 29th, 1906, requiring the carrier receiving the property for transportation from a point in one state to a point in another state, to issue a receipt or bill of lading, therefor, and making such carrier liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company, to which said property may be delivered or over whose line or lines, such property may pass, and further providing that no contract, receipt, rule or regulation shall exempt such common carrier, railroad or transportation company from the liability imposed by this act, is unconstitutional, null and void, and in violation of the provisions of the Fifth Amendment to the Constitution of the United States which declares, that: "No person shall be deprived of life, liberty or property without due process of law."

c. That the provisions of said statute, requiring the initial carrier to issue a through bill of lading, is void as interfering with the defendant's right and liberty of contract, guaranteed by the said Fifth Amendment to the Constitution of the United States;

d. That the provision in said statute that no contract, receipt rule or regulation shall exempt such initial carrier, railroad, or transportation company, from the liability imposed by said act, is to deprive the said defendant of the right and liberty to contract, guaranteed to it, and preserved by the said Fifth Amendment, which provides that: "No person shall be deprived of life, liberty or property, without due process of Law.

e. That the provision in said statute authorizing the initial carrier to recover from the connecting carrier for the amount which the initial carrier paid on account of the default of the connecting carrier, is not the equivalent of just compensation, and in violation of the provision of said Fifth Amendment, that private property shall not be taken for public use without just compensation; and is to force the initial carrier to pay the debt of a third person for the interest, or convenience, of the shipper, consignees, and the public, without just compensation, or without adequate provision for compensation—the Statute making no provision for deposit, bond or security, but forcing the initial carrier to issue the through bill of lading, without reference to the solvency, business,
42 capacity, or ability of one or more connecting carrier forming the line between the initial and the terminal point.

Over the objection of the defendant, the Court sustained the motion of the plaintiff and directed the jury to find a verdict for the plaintiff for $308.03. To, which ruling and direction to find a verdict for the plaintiff, counsel for the defendant then and there, in the presence of the jury, and before the retirement of the jury, duly excepted, and hereby tenders to the court, this its bill of exceptions to sign and seal and the court does hereby sign and seal the same.

Whereupon the jury returned a verdict for the plaintiff for $308.03.

After the jury had returned a verdict for the plaintiff for $308.03, the plaintiff contended that under section 8 of the said Hepburn Act, it was entitled to a reasonable attorney's fee, and thereupon moved that the Court would fix the amount of such attorney's fee to be taxed and collected as a part of the costs in the case. To which motion the defendant objected on the grounds that,

a. The Hepburn Bill did not authorize an allowance for attorneys' fees in suits for recovery of loss or damage to goods shipped, or whether the same had been lost or damaged by the initial or the connecting carrier.

b. And that to include attorney's fees in the judgment against defendant is unequal and unjust, and would take defendant's property without due process of law, in violation of the provisions of the Fifth Amendment to the Constitution of the United States, and the said section 8 of said Hepburn Bill, authorizing that attorney's fees be included against defendant being null and void and in violation of said provision of said 5th Amendment.

After argument, the court granted the motion of the said plaintiff and overruled the objections of the said defendant and allowed the plaintiff $100.00 as attorney's fee, to which the judgment
43 overruling the *the* defendant's objection and allowing the plaintiff $100.00 as attorney's fee, the defendant then and there duly excepted, and hereby tenders to the court, this its bill of exceptions, to sign and seal, and the court does hereby sign and seal the same.

Plaintiff thereupon entered up judgment.

And now during the same term of the court at which the rulings

we were made, verdict rendered and judgment entered, and on this the 2nd day of April, 1909, in furtherance of justice, and that right may be done, the defendant, the Atlantic Coast Line Railroad Company, presents the foregoing as its bill of exceptions in this case, and prays that the same may be settled and allowed and signed and certified by the Judge, as provided by law.

November Term 1908, April 2nd, 1909.

JOSEPH R. LAMAR,
Attorney for the Atlantic Coast Line Railroad Company.

The foregoing bill of exceptions is correct in all respects and is hereby approved, allowed and settled, and made a part of the record herein.

Done in open court at the November Term, 1908, this April 2nd, 1909.

(Signed) EMORY SPEER, *Judge.*

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills versus Atlantic Coast Line Railroad Company. Bill of Exceptions, Order allowing exceptions. Filed in office this April 3rd, 1909, 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

44 *Petition for Writ of Error.*

Supreme Court of the United States.

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

The above named defendant and plaintiff in error, the Atlantic Coast Line Railroad Company, feeling itself aggrieved by the verdict of the jury, the judgment entered thereon, and the rulings of the Court, during the trial of said cause, to which exceptions were duly filed, comes now, by Joseph R. Lamar, its attorney, and showing that the said case involves the construction, or application of the Constitution of the United States;

And that said case is one in which the constitutionality of a law of the United States is drawn in question, and petitions the said Court, upon order allowing said defendant to prosecute a Writ of Error, to the Honorable, the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided, and also that an order be made fixing the amount of security which the defendant shall give and furnish upon said writ of error, and upon the giving of said security, all further proceedings in this Court be suspended, and staid, until the determination of said writ of error by the Supreme Court of the United States.

The said Atlantic Coast Line Railroad Company presents here its assignments of errors.

JOSEPH R. LAMAR,
Attorney for Atlantic Coast Line Railroad Company.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills versus Atlantic Coast Line Railroad Company. Petition for Writ of Error. Filed in office April 3rd, 1909, 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

45 *Assignment of Errors.*

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Now comes the above named plaintiff in error, the Atlantic Coast Line Railroad Company, by Joseph R. Lamar, its attorney, and says, that, in the record and proceedings in the above entitled cause, there is manifest error in this, to wit:

1. Because, on the evidence, and in view of the provisions of the Fifth Amendment to the Constitution of the United States that "No person shall be deprived of property without due process of law", it was error not to direct a verdict for the defendant.

2. Because it affirmatively appears that the defendant has accounted for all goods, except those named in the agreed Statement of Facts, of the value of $308.03, and that such goods of the value of $308.03, received by the Atlantic Coast Line, were duly delivered by it to connecting carriers, and that said goods of the value of $308.03 were lost or damaged by the connecting carrier, and that to make the Atlantic Coast Line Railroad Company liable for the acts of omission, or commission, of such connecting carrier, or for failure to deliver the same to the consignee, is to deprive the said Atlantic Coast Line Railroad Company of its property without due process of law, and in violation of the provision of the Fifth Amendment to the Constitution of the United States, which declares that: "No person shall be deprived of life, liberty or property without due process of law", and it was error not to direct a verdict for the defendant.

3. Because in view of the provisions of the Fifth Amendment to the Constitution of the United States, the plaintiff, under the evidence, was not entitled to recover, (and it was error to direct a verdict for the plaintiff for $308.03 or for any sum),

46 *a.* Because it affirmatively appears that all the goods not accounted for aggregate $308.03, and that such goods were not lost, or damaged by the Atlantic Coast Line Railroad Company, but by connecting carriers, after said goods had been delivered to said connecting carriers by the Atlantic Coast Line Railroad Company, and that to make the Atlantic Coast Line Railroad Company liable for the acts of omission, or commission, of such connecting carrier, or for failure to deliver the same to the consignees, is to deprive the said Atlantic Coast Line Railroad of its property, without due process of law, and in violation of the provisions of the Fifth Amendment to the Constitution of the United States, which declares that: "No person shall be deprived of life, liberty or property without due process of law."

b. That the provisions of the statute popularly known as the Hepburn Bill, to wit: The last 2 paragraphs of section 20 of the Act to Regulate Commerce, as amended June 29th, 1906, requiring the carrier receiving the property for transportation from a point in one state to a point in another state, to issue a receipt or bill of lading, therefor, and making such carrier liable to the lawful holder thereof for any loss, damage or injury to such property caused by it, or by any common carrier, railroad or transportation company, to which said property may be delivered or over whose line or lines, such property may pass, and further providing that no contract, receipt rule or regulation shall exempt such common carrier, railroad or transportation company from the liability imposed by said Act, is unconstitutional, null and void, and in violation of the provisions of the Fifth Amendment to the Constitution of the United States which declares, that: "No person shall be deprived of life, liberty or property, without due process of law."

c. That the provisions of said statute, requiring the initial carrier to issue a through bill of lading, is void as interfering with the defendants right and liberty of contract, guaranteed by the said Fifth Amendment to the Constitution of the United States:

47 *d.* That the provision in said statute that no contract, receipt, rule or regulation shall exempt such initial carrier, railroad or transportation company from the liability imposed by said act, is to deprive the said defendant of the right and liberty to contract, guaranteed to it, and preserved by the said Fifth Amendment, which provides that: "No person shall be deprived of life, liberty, or property, without due process of law."

e. That the provision in said statute authorizing the initial carrier to recover from the connecting carrier for the amount which the initial carrier paid on account of the default of the connecting carrier is not the equivalent of just compensation, and in violation of the provisions of said Fifth Amendment, that private property shall not be taken for public use without just compensation; and is to force the initial carrier to pay the debt of a third person for the interest, or convenience, of the shipper, consignees, and the public, without just compensation, or without adequate provision for compensation,—the statute making no provision for deposit, bond or security, but forcing the initial carrier to issue the through bill of lading, without references to the solvency, business capacity, or ability, of one or more of the connecting carriers, forming the line between the initial and terminal point.

4. Because in view of the provisions of the Fifth Amendment to the Constitution of the United States, providing that: "No person shall be deprived of life, liberty or property, without due process of law", it was error to overrule defendant's demurrer.

That it was error to allow the plaintiff attorney's fees and to tax the same as costs in said cases against the defendant:

a. Because it includes attorney's fees in the judgment against defendant is unequal and unjust, and would be to take defendant's property without due process of law, and in violation of the provisions of the Fifth Amendment to the Constitution of the United States, and the section 8 of said Hepburn Bill authorizing attorney's fees

to be included in the judgment against defendant is null and void, and in violation of said provisions of said Fifth Amendment.

48 Wherefore, the Atlantic Coast Line Railroad Company, defendant in the original cause, and plaintiff in error, herein prays that the judgment of the said Circuit Court be reversed, and said Circuit Court be directed to grant a new trial in said cause.

JOSEPH R. LAMAR,
Attorney for Plaintiff in Error, Atlantic Coast Line Railroad Company, Defendant in the Lower Court.

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Assignments of Error, etc. Filed in office this April 3rd, 1909, 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

Order Allowing Writ of Error.

At a stated term, to wit, the November Term, 1908, of the Circuit Court of the United States of America for the Fifth Judicial Circuit, for the Northeastern Division of the Southern District of Georgia.

Present: Honorable Emory Speer, United States District Judge, presiding in said Circuit Court:

RIVERSIDE MILLS
versus
ATLANTIC COAST LINE RAILROAD COMPANY.

Upon motion of J. R. Lamar, Esquire, Attorney for the Atlantic Coast Line Railroad Company, defendant in the above cause, and upon filing a petition for a writ of error, and assignment of error,

It is ordered that a Writ of Error be, and hereby is, allowed to have reviewed in the Supreme Court of the United States, the rulings and judgments heretofore entered herein, and that the amount of bond on said Writ of Error, be and hereby is, fixed at $500, and upon giving such security, all further proceedings in this

49 Court be suspended and stayed until the determination of said appeal by said Supreme Court of the United States. Said bond to act as a supersedeas bond, also as a bond for costs and damages on appeal.

This 2nd day of April, 1909.

(Signed) EMORY SPEER, *Judge.*

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills, versus Atlantic Coast Line Railroad Company. Order allowing Writ of Error and fixing bond. Filed in office this April 3rd, 1909, 6 o'Clock, P. M., W. H. Godwin, Deputy Clerk.

Citation.

UNITED STATES OF AMERICA;

The President of the United States to Riverside Mills and R. J. Sothall, and Alexander Akerman, its attorneys, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States at Washington, within thirty days from the date of this Writ, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States for the Northeastern Division, Southern District of Georgia, wherein the Atlantic Coast Line Railroad Company is plaintiff in Error; and you, the Riverside Mills, is defendant in Error, to show cause, if any there be, why the judgment in the said Writ of Error mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 2nd day of April, 1909, and of the Independence of the United States, the one hundred and thirty third.

(Signed) EMORY SPEER,
United States District Judge, Presiding in the Circuit Court Aforesaid.

Attest
T. F. JOHNSON, *Clerk.*
By W. H. GODWIN, *Deputy Clerk.*

Service of the above citation, and a receipt of a copy, admitted this 2nd day of April, 1909, and all other and further service waived.
R. J. SOUTHALL AND
AKERMAN AND AKERMAN,
Attorneys for Riverside Mills.

50 Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills versus Atlantic Coast Line Railroad Company. Citation. Filed in office this April 3rd, 1909, 10 o'Clock, A. M., W. H. Godwin, Deputy Clerk.

Appeal Bond.

Know all men by these presents, that we, The Atlantic Coast Line Railroad Company, as principal, and L. D. McCullom, as surety, are held and firmly bound unto Riverside Mills, in the full and just sum of Five Hundred dollars, to be paid to the said Riverside Mills, certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this 9th day of February, in the year of our Lord one thousand nine hundred and nine.

Whereas lately at a United States Circuit Court for the Northeastern Division of the Southern District of Georgia, in a suit de-

pending in said Court, between Riverside Mills, plaintiff, and the Atlantic Coast Line Railroad Company, defendant, a verdict and judgment was rendered against the said Atlantic Coast Line Railroad Company, and the said Atlantic Coast Line Railroad Company, having obtained a Writ of Error, and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Riverside Mills, citing and admonishing the Riverside Mills, and its attorneys, to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said Atlantic Coast Line Railroad Company shall prosecute said Writ of Error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation is void; else to remain in full force and virtue.

ATLANTIC COAST LINE RAILROAD COMPANY,
By J. R. LAMAR, *Attorney.* [SEAL.]
L. D. McCULLOM. [SEAL.]

Approved by:
EMORY SPEER, *Judge.*

Endorsement: United States Circuit Court, Northeastern Division, Southern District of Georgia. Riverside Mills versus Atlantic Coast Line Railroad Company. Appeal Bond. Filed in office this April 3rd, 1909, 10 o'clock A. M., W. H. Godwin, Deputy Clerk.

51 In the Circuit Court of the United States for the Northeastern Division of the Southern District of Georgia.

I, W. H. Godwin, Deputy Clerk of the Circuit Court of the United States for the Southern District of Georgia, at Augusta in the fifth Circuit and District aforesaid, do hereby certify the foregoing to be a true and correct copy of the record and of all the proceedings in cause No. 68 on the common law docket of said Court, entitled Riverside Mills versus Atlantic Coast Line Railroad Company, as the same now appears on file and of record in the office of the Clerk of said Court, at Augusta, in said District.

To certify which, witness my hand and the seal of said Court at Augusta, in said district, this the 26th day of April, A. D. 1909.

[Seal of U. S. Circuit Court Southern District of Georgia.]

W. H. GODWIN,
Deputy Clerk U. S. Circuit Court, Southern District of Georgia, Northeastern Division, at Augusta.

[Endorsed:] United States Circuit Court, Northeastern Division, Southern District of Georgia. Atlantic Coast Line R. R. Co., plaintiff in error, versus Riverside Mills, defendant in error. Transcript.

Endorsed on cover: File No. 21,650. S. Georgia C. C. U. S. Term No. 441. Atlantic Coast Line Railroad Company, plaintiff in error, versus Riverside Mills. Filed May 4th, 1909. File No. 21,650.

OPINION

ATLANTIC COAST LINE RAILROAD COMPANY *v.* RIVERSIDE MILLS.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

No. 215. Argued October 19, 20, 1910.—Decided January 3, 1911.

A provision in a bill of lading issued by the initial carrier, that it should not be liable for loss or damage not occurring on its portion of the route, is not a contract of exemption from its own liability as a carrier, but a provision of non-assumption of the liabilities of others and at common law relieves it of such liabilities.

The general rule adopted by this court is that, in the absence of legislation, a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier; it may, however, contract to carry beyond its line, and if it does so its common-law carrier liability extends over the entire route.

It was not only the legal elements of the situation, but also the fact that the business prosperity of the country largely depends on through rates and routes of transportation, that induced Congress to enact such regulations in regard to the duties and liabilities of interstate carriers as would relieve shippers whose goods were damaged from the burden of proving where the loss occurred.

There is no absolute freedom of contract. The Government may deny liberty of contract by regulating or forbidding every contract reasonably calculated to injuriously affect public interests.

The United States is a Government of limited and delegated powers but in respect to the powers delegated, including that to regulate commerce between the States, the power is absolute except as limited by other provisions of the Constitution.

Congress has power to prohibit a carrier engaged in interstate commerce from limiting by contract its liability beyond its own line,

and the Carmack amendment of January 29, 1906, c. 3591, 34 Stat. 584, 595, to § 20 of the Interstate Commerce Act, making such carriers liable for loss or damage to merchandise received for interstate transportation beyond their own lines, notwithstanding any contract of exemption in the bill of lading, is a valid exercise of such power and is not in conflict with the due process provision of the Fifth Amendment.

Quære, and not decided, whether a carrier can be compelled to accept goods for transportation beyond its own lines or be required to make a through or joint rate over independent lines.

Under the Carmack amendment to the Interstate Commerce Act, the initial carrier is, as principal, liable not only for its own negligence, but that of any agency which it may use, although as between themselves the carrier actually causing the loss may be primarily liable.

Section 8 of the act to regulate commerce of February 4, 1887, c. 104, 24 Stat. 379, 382, does not authorize the taxing of an attorney's fee in an action to recover damages for loss to goods which does not result from a violation of the act.

168 Fed. Rep. 987 and 990, affirmed.

THIS was an action to recover the value of goods received by the Atlantic Coast Line Railroad at a point on its line in the State of Georgia for transportation to points in other States. The agreed statement of facts showed that the goods were safely delivered by the Atlantic Coast Line Railroad to connecting carriers, and were lost while in the care of such carriers, and the question is whether the initial carrier is liable for such loss.

The stipulated facts showed that the goods were tendered to the Atlantic Coast Line Railroad and through bills of lading demanded therefor, which were duly issued, as averred, on the dates named in the petition. That the goods so received were forwarded over the lines of the receiving road and in due course delivered to a connecting carrier engaged in interstate shipment for continuance of the transportation. It was also stipulated "that the Riverside Mill made constant and frequent shipments over the Atlantic Coast Line, and had a blank form of receipt, like the attached, marked 'A,' which the

Riverside Mill filled out, showing what goods it had loaded into cars and the name of the consignee; said receipt containing a stipulation that the shipment is 'per conditions of the company's bill of lading,' and that the Atlantic Coast Line Railroad Company, on said receipts prepared by the Riverside Mill, issued, for each of the shipments hereinbefore referred to, bills of lading on forms like that attached, marked exhibit 'B.' "

Upon the reverse side of the bill of lading were certain conditions, one of which was that "No carrier shall be liable for loss or damage not occurring on its portion of the route." The tenth clause thereof was in these words:

"This bill of lading is signed for the different carriers who may engage in the transportation, severally but not jointly, each of which is to be bound by and have the benefits of the provisions thereof, and in accepting this bill of lading the shipper, owner and consignee of the goods, and the holder of the bill of lading, agree to be bound by all its stipulations, exceptions and conditions, whether printed or written."

The court below, upon this state of facts, instructed a verdict for the plaintiff, upon which there was judgment for the amount of the verdict, and, upon motion of the plaintiff, an attorney's fee of $100 was ordered to be taxed as part of the costs in the case. Thereupon error was assigned, and this writ of error sued out by the railroad company.

Mr. J. R. Lamar, for plaintiff in error in this case and *Mr. C. H. Moorman*, with whom *Mr. B. D. Warfield* and *Mr. Henry L. Stone* were on the brief, for plaintiff in error in No. 286:[1]

The cases below hold that the statute is a great convenience to the shipper; is declaratory of the common law; that the initial carrier at common law is liable beyond its

[1] See *post*, p. 209.

line, and can be prohibited from limiting an existing liability beyond its line; that amendment becomes a part of the contract, and as the goods are voluntarily accepted for interstate shipment, they are therefore subject to interstate regulations of Congress; that contracts of exemption are rendered ineffectual by this statute, and that Congress has the same power to regulate commerce as it has to regulate the relation of master and servant; that it is an incident of the right to make through and joint rates. *Smeltzer Case*, 158 S. W. Rep. 649; *L. & N. R. R. Co.* v. *Scott*, 118 S. W. Rep. 992; *Pittsburg Ry. Co.* v. *Mitchell*, 91 N. E. Rep. 735; *Galveston* v. *Piper*, 115 S. W. Rep. 108; *St. Louis* v. *Grayson*, 115 S. W. Rep. 933; *Greenwald* v. *Weir*, 115 N. Y. Supp. 311.

Plaintiff in error, however, claims that the act deprives both the initial carrier and the shipper of the right to make a just and reasonable contract which it could do at common law. 1 Hutchinson on Carriers, 3d ed., 153, 233, 405; *Cau* v. *Texas & Pacific Ry. Co.*, 194 U. S. 424; *Michigan Central* v. *Myrick*, 107 U. S. 102. This is contrary to the Fifth Amendment, *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 45; *Adair* v. *United States*, 208 U. S. 161, 174, as is also the provision that the initial carrier "shall issue a bill of lading" and "shall be liable to the holder of the bill of lading for any damage caused by any connecting carrier. *Attorney General* v. *Old Colony R. R. Co.*, 22 L. R. A. 112; *Norfolk R. R. Co.* v. *Stuart Co.*, 63 S. E. Rep. 415; *McCann* v. *Eddy* (Mo.), 27 S. W. Rep. 541; Cooley's Const. Lim., 7th ed., 150; *Lindsey Co.* v. *Mullen*, 176 U. S. 155, 143; *Rodgers* v. *Camp*, 44 Connecticut, 297; *Colon* v. *Lisk*, 47 N. E. Rep. (N. Y.) 333; *Ohio &c. R. R. Co.* v. *Lacey*, 78 Illinois, 55; *Knoxville R. R. Co.* v. *McMillan*, 65 L. R. A. 296; *Woodward* v. *Vermont Central R. R. Co.*, 62 N. E. Rep. 1051; 180 Massachusetts, 599; 217 U. S. 196, 205; *Dirkin* v. *Kingston Coal Co.*, 171 Pa. St. 199, 203; *S. C.*, 50 Am. St. Rep.

805; *Williams* v. *Thaylor Co.*, 40 L. R. A. 812 (W. Va.); *Missouri R. R. Co.* v. *Nebraska*, 164 U. S. 403; *Same* v. *Same*, 217 U. S. 196.

Giving the initial carrier its day in court does not save the statute, as no provision for hearing will support a statute that takes the property of A to pay the debt of B. *Chicago &c. R. R. Co.* v. *Chicago*, 166 U. S. 234; *Long Island Water Co.* v. *Brooklyn*, 166 U. S. 695; *Taylor* v. *Porter*, 4 Hill (N. Y.), 140.

The act does not even give the connecting carrier its day in court. It is bound by the judgment without notice, and if it had notice, the connecting carrier is not estopped from showing that it was free from negligence. *Robins* v. *Chicago*, 2 Black, 418; *City of Boston* v. *Worthington*, 10 Gray, 496; *Lincoln* v. *First Nat. Bank*, 60 L. R. A. 924.

The act would make a connecting carrier in Canada liable on shipment from New York to Detroit, though manifestly the Canadian company is not subject to the provisions of the Hepburn bill.

Even if the judgment against the initial carrier does bind the connecting carrier, that could not satisfy the requirement of the Constitution, for a subsequent and contingent right to an action at law against corporations or individuals of undefined responsibility is not the compensation which the Constitution requires. *Bloodgood* v. *Mohawk*, 31 Am. Dec. 368; *Haverhill* v. *Commissioners*, 103 Massachusetts, 120; *Stockyard Co.* v. *L. & N. R. R. Co.*, 192 U. S. 568; *Cherokee Nation* v. *Sou. Pac. R. R. Co.*, 135 U. S. 661.

The statute is not a valid exercise of the power to regulate commerce. Citizens have the right to engage in interstate commerce. *Crutcher* v. *Kentucky*, 141 U. S. 57. They are not obliged to yield to an unconstitutional statute as condition precedent to so doing. Nor can Congress treat the right as a privilege not to be availed of except

upon such conditions it may prescribe, if the conditions are otherwise beyond the power of Congress. *Employers' Liability Case*, 207 U. S. 502; *Adair Case*, 208 U. S. 180. The grant to the National Government under the commerce clause is subject to the limitations of the Fifth Amendment. *Monongahela Bridge Co.* v. *United States*, 148 U. S. 345.

The power to regulate commerce includes the power to facilitate and expedite transportation of goods, but does not authorize the prohibition of the reasonable and just contracts under which commerce has been developed, and which do not, and are not intended to, impede commerce. *Railroad Co.* v. *Richmond*, 19 Wall. 589, 590; *Central Ry. Co.* v. *Murphy*, 196 U. S. 204, 205; *Lottery Case*, 188 U. S. 362.

The statute contains provisions which are not valid regulations of interstate commerce. The initial carrier cannot be made liable on the theory that Congress has power to make through and joint rates. For the making of through and joint rates is essentially contractual. *Star Co.* v. *Atchison R. R. Co.*, 14 I. C. C. 354; *Kentucky Bridge Co.* v. *L. & N. R. R. Co.*, 37 Fed. Rep. 630; and the courts have never decided to what extent the carrier can be required to make through and joint rates. *Sou. Pac. R. R. Co.* v. *I. C. C.*, 200 U. S. 553; *Atchison Ry. Co.* v. *Denver &c. Ry. Co.*, 110 U. S. 680; *Cole* v. *Central*, 86 Georgia, 255; *Burlington Ry. Co.* v. *Dey*, 82 Iowa, 312; *S. C.*, 31 Am. St. Rep. 490, 499; *Jacobson* v. *Wisconsin*, 70 Am. St. Rep. 364; 179 U. S. 292; *Central Stockyards* v. *L. & N. R. R. Co.*, 192 U. S. 571; *Chicago &c. Ry. Co.* v. *Osborne*, 52 Fed. Rep. 915; *Int. Com. Com.* v. *Stickney*, 215 U. S. 98, 106; *Penn Ref. Co.* v. *Western &c. R. R. Co.*, 208 U. S. 208, 222.

Limited liability acts of Congress, whether passed in pursuance of the admiralty jurisdiction or the commerce clause, or both, were primarily intended to prevent the making of unreasonable stipulations in bills of lading

(*The Delaware*, 161 U. S. 472), and at most only related to the liability of owners for their own negligence, and did not make them or the vessel liable for injuries occasioned by the negligence of another vessel by which the goods might be forwarded.

The initial carrier is not liable on the ground stated in the *Smeltzer Case*, 158 Fed. Rep. 661, that the act became a part of the contract, for if the act is void, it imposes no duties, and is as though it had never been passed. *Norton* v. *Shelby County*, 118 U. S. 426; *Cleveland* v. *Clemmons*, 59 L. R. A. 775; *People ex rel. Rodgers* v. *Koler*, 166 N. Y. 1; *S. C.*, 52 L. R. A. 814.

Nor has the company voluntarily made itself liable. *Lake Shore Ry. Co.* v. *Smith*, 173 U. S. 697.

The contract under which the goods were received is an entirety. Part of it cannot be laid hold of to acquire interstate jurisdiction, and the balance ignored, whereby interstate relation is stipulated to cease in law, when it ceases in fact by delivery to the next carrier. *McCarn* v. *International Co.*, 19 S. W. Rep. 549; *Hartley* v. *St. Louis Co.*, 89 N. W. Rep. 88; *Railroad Co.* v. *Richmond*, 19 Wall. 589; *Michigan Central R. R. Co.* v. *Myrick*, 107 U. S. 110.

The statute imposes mandatory requirements instead of permissive provisions at common law, and the Missouri statute in part copied by the Carmack amendment was sustained because the provisions were not mandatory. *Missouri Ry. Co.* v. *McCann*, 174 U. S. 580.

The provision as to attorney's fees under § 8, also takes property without due process of law. *Gulf &c. R. R. Co.* v. *Ellis*, 165 U. S. 150, 160.

Mr. John Maynard Harlan and *Mr. Lewis W. McCandless*, by leave of the court, filed a brief attacking the constitutionality of certain portions of § 20 of the act to regulate commerce.

Mr. R. J. Southall, with whom *Mr. Charles Akerman* and *Mr. Alexander Akerman* were on the brief, for defendant in error, submitted:

The mischief sought to be remedied by the statute was the trouble, delay, and expense to the shipper in collecting claims for loss or damage by the carriers. *Cent. of Ga. Ry. Co.* v. *Murphey*, 196 U. S. 194.

The constitution gives Congress full power to regulate interstate commerce. *Gibbons* v. *Ogden*, 9 Wheat. 196; *Howard* v. *Ill. Cent. R. R. Co.*, 207 U. S. 463; *Smeltzer* v. *St. Louis & S. F. R. R. Co.*, 158 Fed. Rep. 649; *Lottery Case*, 188 U. S. 321.

Section 20 of the Hepburn bill (Carmack amendment) was only intended to compel the carriers to return to the common-law rule which made the initial carriers liable, in the absence of contract limiting the carrier to liability for loss occurring on its own line, and to prohibit such contracts as being contrary to the declared public policy of the United States. *A., T. & S. F. R. R. Co.* v. *D. & N. O. R. R. Co.*, 110 U. S. 688; *Southern Pacific Co.* v. *Crenshaw*, 5 Ga. App. 675; *S. C.*, 63 S. E. Rep. 865; *Smeltzer* v. *St. Louis & S. F. R. R. Co.*, 158 Fed. Rep. 649.

The liberty of contract guaranteed by the Constitution is subject to such reasonable restraints as may be imposed by Congress for the public good and general welfare. *Adair* v. *United States*, 208 U. S. 161; *United States* v. *Traffic Association*, 171 U. S. 571; *United States* v. *Trans-Missouri Assn.*, 166 U. S. 290; *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Swift & Co.* v. *United States*, 196 U. S. 375.

Railroad companies are subject to legislative control for the protection of the public. *N. Y. & N. E. R. R. Co.* v. *Bristol*, 151 U. S. 556; *Nashville, C. & St. L. R. R. Co.* v. *Alabama*, 128 U. S. 96; *Georgia R. & Bkg. Co.* v. *Smith*, 128 U. S. 174; *Minneapolis & St. L. R. R. Co.* v. *Beck-*

with, 129 U. S. 26; *Dent* v. *West Virginia*, 129 U. S. 114; *Charlotte, C. & S. R. R. Co.* v. *Gibbes*, 142 U. S. 386; *Minneapolis & St. L. R. R. Co.* v. *Emmons*, 149 U. S. 364.

Congress may fix a new rule of civil liability in matters of interstate commerce. Act of March 2, 1893, 27 Stat. 531; *Johnson* v. *Sou. Pac. Co.*, 196 U. S. 1.

As to the power of Congress to regulate the liability of carriers and others engaged in interstate commerce for injury to person or property, see *Sherlock* v. *Alling*, 93 U. S. 99; *Missouri R. R. Co.* v. *Mackey*, 127 U. S. 205; *Baltimore & Ohio R. R. Co.* v. *Baugh*, 149 U. S. 368; *Chicago, M. & St. P. R. R. Co.* v. *Solan*, 169 U. S. 133; *Martin* v. *Pittsburg & L. E. R. R. Co.*, 203 U. S. 284.

It is for Congress to determine what public policy requires with respect to common carriers engaged in interstate commerce. *United States* v. *Joint Traffic Assn.*, 171 U. S. 569, 571; *Missouri R. R. Co.* v. *Mackey*, 127 U. S. 205.

The allowance of attorneys' fees was proper. *Seaboard Air Line* v. *Seegers*, 207 U. S. 73; *Montague & Co.* v. *Lowry*, 193 U. S. 38.

Mr. Wm. S. Kenyon, Assistant to the Attorney General, with whom *The Attorney General* was on the brief, by leave of the court for the United States, as *amicus curiæ* in support of the constitutionality of § 20 of the act of June, 1906.

After making the above statement, MR. JUSTICE LURTON delivered the opinion of the court.

The goods of the defendants in error were lost by a connecting carrier to whom they had been safely delivered. Though received for a point beyond its own line and for a point on the line of a succeeding carrier, there was no agreement for their safe carriage beyond the line of the plaintiff in error, but, upon the contrary, an express

agreement that the initial carrier should not be liable for "a loss or damage not occurring on its own portion of the route." Such a provision is not a contract for exemption from a carrier's liability as such, but a provision making plain that it did not assume the obligation of a carrier beyond its own line, and that each succeeding carrier in the route was but the agent of the shipper for a continuance of the transportation. It is therefore obvious that at the common law an initial carrier under such a state of facts would not be liable for a loss through the fault of a connecting carrier to whom it had, in due course, safely delivered the goods for further transportation. *Railroad* v. *Pratt*, 22 Wall. 123; *Myrick* v. *Railroad*, 107 U. S. 102; *Southern Pac. Ry.* v. *Interstate Commerce Commission*, 200 U. S. 536, 554. Liability is confessedly dependent upon the provision of the act of Congress regulating commerce between the States known as the Carmack amendment of January 29, 1906, c. 3591, § 7, 34 Stat. at Large, 584, 595. The twentieth section of the act of February 4, 1887, c. 104, 24 Stat. at Large, 379, as changed by the Carmack amendment, reads as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed. Provided, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The power of Congress to enact this legislation has been denied, first, because it is said to deprive the carrier and the shipper of their common-law power to make a just and reasonable contract in respect to goods to be carried to points beyond the line of the interstate carrier; and, second, that in casting liability upon the initial carrier for loss or damage upon the line of a connecting carrier the former is deprived of its property without due process of law.

The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and "receiving property for transportation from a point in one State to a point in another State" as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents.

Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or, it might elect to carry safely over its own lines only and then deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving carrier's liability, as carrier, extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agent. In the other case its carrier liability ends at its own terminal, and its further liability is merely that of a forwarder. Having this power to make the one or the

other contract, the only question which has occasioned a conflict in the decided cases was whether it, in the particular case, made the one or the other.

The general doctrine accepted by this court, in the absence of legislation, is, that a carrier, unless there be a special contract, is only bound to carry over its own line and then deliver to a connecting carrier. That such an initial carrier might contract to carry over the whole route was never doubted. It is equally indisputable that if it does so contract, its common-law carrier liability will extend over the entire route. *Railway* v. *McCarthy*, 96 U. S. 258, 266; *Railroad* v. *Pratt*, 22 Wall. 123; *Railroad* v. *American Trading Co.*, 195 U. S. 439; *Muschamp* v. *Lancaster Railway Co.*, 8 M. & W. 421.

The English cases beginning with *Muschamp* v. *Lancaster Railway Company*, 8 M. & W. 421, decided in 1841, down to *Bristol &c. Railway* v. *Collins*, 7 H. L. Cases, 194, have consistently held that the mere receipt of property for transportation to a point beyond the line of the receiving carrier, without any qualifying agreement, justified an inference of an agreement for through transportation and an assumption of full carrier liability by the primary carrier. The ruling is grounded upon considerations of public policy and public convenience, and classes the receipt of goods so designated for a point beyond the carrier line as a holding out to the public that the carrier has made its own arrangements for the continuance by a connecting carrier of the transportation after the goods leave its own line. There are American cases which take the same view of the question of evidence thus presented. Some of them are *Railroad* v. *Campbell*, 7 Heisk. (Tenn.) 257; *Railroad* v. *Mt. Vernon Co.*, 84 Alabama, 175; *Railroad* v. *Hasselkus*, 91 Georgia, 384; *Beard* v. *Railroad*, 79 Iowa, 531; *Kyle* v. *Railroad*, 10 Rich. (S. C.) 382; *Railroad* v. *Wilcox*, 84 Illinois, 240; *Railroad* v. *Rogers & Hartsell*, 6 Heisk. (Tenn.) 143.

Upon the other hand, many American courts have repudiated the English rule which holds the carrier to a contract for transportation over the whole route, in the absence of a contract clearly otherwise, and have adopted the rule that unless the carrier specifically agrees to carry over the whole route its responsibility, as a carrier, ends with its own line, and that for the continuance of the shipment its liability is only that of a forwarder. The conflict has, therefore, been one as to the evidence from which a contract for through carriage to a place beyond the line of the receiving carrier might be inferred.

In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress by the act here involved has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout. But this uncertainty of the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line was not all which might well induce the interposition of the regulating power of Congress. Nothing has perhaps contributed more to the wealth and prosperity of the country than the almost universal practice of transportation companies to coöperate in making through routes and joint rates. Through this method a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its origin in the mutual interests of such companies and in the necessities of an expanding commerce.

In the leading case of *Muschamp* v. *Lancaster Railway Company*, cited above, Lord Abinger defended the inference of a contract for through carriage from the mere

receipt of a package destined to a point beyond the line of the receiving carrier upon the known practice in his day of such carriers. Upon this subject, in speaking of connecting lines of railway, he said: "These railway companies, though separate in themselves, are in the habit, for their own advantage, of making contracts, of which this was one, to convey goods along the whole line, to the ultimate terminus, each of them being agents of the other to carry them forward, and each receiving their share of the profits from the last."

The tenth clause of the conditions annexed to this bill of lading, and shown elsewhere, affords a fair illustration of the customary methods of connecting carriers to cooperate for their mutual benefit in carrying on transportation begun by one which must be continued by other lines over which the thing to be transported must go. The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them, "severally, but not jointly," one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on its own line. Through this well known and necessary practice of connecting carriers there has come about, without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier and beneficial to the great and growing commerce of the country.

Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier for the purpose of carriage would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package

must go a separate agreement limiting the carrier liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carriers who in turn had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. Thus when this Carmack amendment was reported by a conference committee, Judge William Richardson, a Congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:

"One of the great complaints of the railroads has been —and, I think, a reasonable, just and fair complaint— that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, respon-

sible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing us to do that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the coöperation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference." (Cong. Rec. Pt. 10, p. 9580.)

It must be conceded that the effect of the act in respect of carriers receiving packages in one State for a point in another and beyond its own lines, is to deny to such an initial carrier the former right to make a contract limiting liability to its own line. This it is said is a denial of the liberty of contract secured by the Fifth Amendment to the Constitution. To support this counsel cite such cases as *Allgeyer* v. *Louisiana*, 165 U. S. 589; *Lochner* v. *New York*, 198 U. S. 45, and *Adair* v. *United States*, 208 U. S. 161.

This power to regulate is the right to prescribe the rules under which such commerce may be conducted. "It is," said Chief Justice Marshall, in *Gibbons* v. *Ogden*, 9 Wheat. 1, 197, "a power vested in Congress as absolutely as it would be in a single government having in its constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States." It is a power which extends to the regulation of the appliances and machinery and agencies by which such commerce is conducted. Thus in *Johnson* v. *Southern Pac. Ry.*, 196 U. S. 1, an act prescribing safety ap-

pliances was upheld. And in *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, it was held that the equipment of an interstate railway, including cars used for the transportation of its own fuel, was subject to the regulation of Congress. In *Interstate Commerce Commission* v. *C. & A. Ry. Co.*, 215 U. S. 479, it was held to extend to the distribution of coal cars to the shipper, so as to prevent discrimination. In *The Employers' Liability Cases*, 207 U. S. 463, 495, power to pass an act which regulated the relation of master and servant, so as to impose on the carrier, while engaged in interstate commerce, liability for the negligence of a fellow-servant, for which at common law there was no liability, and depriving such carrier of the common-law defense of contributory negligence save by way of reduction of damages, was upheld. In *Addyston Pipe Co.* v. *United States*, 175 U. S. 211, and *Northern Securities Co.* v. *United States*, 193 U. S. 197, it was held that this power of regulation extended to and embraced contracts in restraint of trade between the States.

It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

Having the express power to make rules for the con-

duct of commerce among the States, the range of Congressional discretion as to the regulation best adapted to remedy a practice found inefficient or hurtful, is a wide one. If the regulating act be one directly applicable to such commerce, not obnoxious to any other provision of the Constitution, and reasonably adapted to the purpose by reason of legitimate relation between such commerce and the rule provided, the question of power is foreclosed. "The test of power," said Mr. Justice White, speaking for this court in the *Employers' Liability Cases*, cited above, "is not merely the matter regulated, but whether the regulation is directly one of interstate commerce, or is embraced within the grant conferred on Congress to use all lawful means necessary and appropriate to the execution of the power to regulate commerce."

That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers who undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rates, but the collection of the single charge made by the carrier at one or the other end of the route. This involves frequent and prompt settlement of traffic

balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

But, it is said, that any security resulting from a voluntary agreement constituting a through route and rate is destroyed if the receiving carrier is not at liberty to select his own agencies for a continuance of the transportation beyond his own line. This is an objection which has no application to the present case. This action was for loss and damage arising from several distinct shipments to different places beyond the line of the plaintiff in error who was the initial or receiving carrier. The presumption from the absence of anything to the contrary in the record is that the routing was over connecting lines with whom the plaintiff in error had theretofore made its own arrangements and rate. This record presents no question as to the right of the initial carrier to refuse a shipment designated for a point beyond its own line, nor its right to refuse to make a through route or joint rate when such route and rate would involve the continuance of a transportation over independent lines. We, therefore, refrain from any consideration of the large question thus suggested. The shipments involved in the present case were voluntarily received by an initial carrier who undertook to escape carrier's liability beyond its own line by a provision limiting liability to loss upon its own line. This was forbidden by the Carmack amendment and any stipulation and condition in the

special receipt which contravenes the rule in question is invalid.

Reduced to the final results, the Congress has said that a receiving carrier, in spite of any stipulation to the contrary, shall be deemed, when it receives property in one State to be transported to a point in another involving the use of a connecting carrier for some part of the way, to have adopted such other carrier as its agent, and to incur carrier liability throughout the entire route, with the right to reimbursement for a loss not due to his own negligence. The conditions which justified this extension of carrier liability we have already adverted to. The rule of the common law which treated a common carrier as an insurer grew out of a situation which required that kind of security for the protection of the public. To quote the quaint but expressive words of Lord Holt, in *Coggs* v. *Bernard*, 2 Ld. Raymond, 909, when defending and appying the doctrine of absolute liability against loss not due to the act of God or the public enemy, "this rule," said he, "is a politick establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sort of persons that they may be safe in their ways of dealing."

If it is to be assumed that the ultimate power exerted by Congress is that of compelling coöperation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate lines or operation it stops with the requirement of oneness of charge, continuity of transportation and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route. That there is some chance that this right of recoupment may not be always effective may be conceded without invalidating the regulation. If the

power existed and the regulation is adapted to the purpose in view, the public advantage justifies the discretion exercised and upholds the legislation as within the limit of the grant conferred upon Congress. Touching the range of legislative discretion of the States in respect to occupations or trades which are affected by a public use, this court, in *Gundling* v. *Chicago*, 177 U. S. 183, 188, said:

"Unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend, beyond the power of the State to pass, and they form no subject for Federal interference. As stated in *Crowley* v. *Christensen*, 137 U. S. 86, 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authority of the country essential to the safety, health, peace, good order and morals of the community.' "

But it is said that the act violates the Fifth Amendment by taking the property of the initial carrier to pay the debt of an independent connecting carrier whose negligence may have been the sole cause of the loss. But this contention results from a surface reading of the act and misses the true basis upon which it rests. The liability of the receiving carrier which results in such a case is that of a principal for the negligence of his own agents.

In substance Congress has said to such carriers, "If you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuance of the transit, you must use them as your own agents and not as agents of the shipper." It is, therefore, not the case of making one pay the debt of another. The receiving

carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable.

In *Seaboard Air Line* v. *Seegers*, 207 U. S. 73, 78, legislation by the State of Georgia imposing a penalty on common carriers for failure to adjust damage claims within forty days was held to neither deny due process nor the equal protection of the law. Speaking by Mr. Justice Brewer, the court said of the reasonableness of the requirement and classification, that "the matter to be adjusted is one peculiarly within the knowledge of the carrier. It receives the goods and has them in its custody until the carriage is completed. It knows what it received and what it delivered. It knows what injury was done during the shipment and how it was done. The consignee may not know what was in fact delivered at the time of the shipment, and the shipper may not know what was delivered to the consignee at the close of the transportation. The carrier can determine the amount of the loss more accurately and promptly and with less delay and expense than anyone else, and for the adjustment of loss or damage to shipments within the State forty days cannot be said to be an unreasonably short length of time."

The conclusion we reach in respect to the validity of the amendment has the support of some well-considered cases. Among them we cite: *Smeltzer* v. *Railroad*, 158 Fed. Rep. 649; *Railroad* v. *Mitchell*, 91 N. E. Rep. 735; *Railroad* v. *Scott*, 118 S. W. Rep. 992.

The judgment included an attorney's fee taxed as part of the costs. The authority for this is supposed to be found in the eighth section of the act to regulate commerce of February 4, 1887, chap. 104, § 8 (24 Stat. at Large, p. 379, 382). The section reads as follows:

"That in case any common carrier subject to the pro-

visions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs of the case."

But that section applies to cases where the cause of action is the doing of something made unlawful by some provision of the act, or the omission to do something required by the act, and there is a recovery "of damages sustained in consequence of any such violation of this act," etc. The cause of action in the present case is not for damages resulting from "any violation of the provisions of this act." True, the plaintiff in error attempted by contract to stipulate for a limitation of liability to a loss on its own line, and in this action has defensively denied liability for a loss not occurring on its own line. But the cause of action was the loss of the plaintiff's property which had been entrusted to it as a common carrier, and that loss is in no way traceable to the violation of any provision of the act to regulate commerce. Having sustained no damage which was a consequence of the violation of the act, the section has no application to this case.

The judgment was erroneous to this extent, and the provision for an attorney's fee is stricken out, and the judgment thus modified is

Affirmed.

district attorney of his district, who promptly notified the magistrates and constables that they had no authority to *compromise* any case without his knowledge and consent.

This action on the part of the judge and the district attorney went far to break up this mode of procedure, and some other course had to be invoked to meet the wishes of the employer. Affidavits were made, warrants issued, and the party arrested and put in jail; the employer engaged the services of some attorney to defend the man he had caused to be apprehended for the alleged violation of this labor act; the attorney waived preliminary examination, had the bond fixed, and the employer became surety on an appearance bond; the prisoner was released and promptly returned to work; the bond was executed for the appearance of the accused to *answer such charges as the grand jury might prefer against him.*

No charges were ever preferred, of course, the employer failing to appear before the grand jury, or, if appearing, exonerating the accused, and having the charge either ignored or continued for further action. The very worst sort of servitude. The prisoner is unrepresented; the attorney representing the employer is led to believe that the case is at an end, receives his fee, and has no further connection with the matter. The prisoner simply knows that he is out of jail; when he asks about it, if he ever does, he is informed that his case has been continued and he remains in bondage, working for his surety, perhaps without any compensation, and surely "laboring against

> his will to pay the debt formerly claimed against him," and for the nonpayment of which he was arrested.

If the court wishes a practical illustration of the manner in which the Alabama statute may be used, it need only refer to the records in cases Nos. 378 (pp. 215–220) and 379 (pp. 383–387) on its docket for this term, *Harlan et al.* v. *McGourin* and *Gallagher* v. *McGourin*. These show that Harlan, who was manager of a lumber company in ~~Florida~~ Alabama, swore out warrants before a justice of the peace in Alabama, under ~~the statute in question~~ a statute similar to the one in question relating to immigrants (sic Code Ala.), charging two men named Barsoda and Krum with violating their contracts of service without repaying certain advances made them; that the parties named were arrested and put in jail, and that subsequently Harlan dismissed the complaints upon their entering into new contracts with the company. Harlan, Gallagher, and others were convicted of conspiring to return certain persons to peonage, and the evidence in those cases showed that a most atrocious system of enforced labor prevailed in their lumber camp.

A former officer of the Department of Justice, who made a special study of the subject of peonage, says:

> I have no doubt, from my investigations and experiences, that the chief support of peonage is the peculiar system of state laws prevailing in the South, intended evidently to compel service on the part of the workingman.
>
> From the usual condition of the great mass of laboring men where these laws are

COPY

in force to peonage is but a step at most. In fact, it is difficult to draw a distinction between the condition of a man who remains in service against his will, because the State has passed a certain law under which he can be arrested and returned to work, and the condition of a man on a near-by farm who is actually made to stay at work by arrest and actual threats of force under the same law. The actual spoken threat of an individual employer who makes his laborer stay at work against his will by fear of the chain gang and the threat of the State to send him to the chain gang whenever his employer chooses to have him arrested are the same in result and do not seem to me very different in any other way.

This Congress may have vaguely understood when it passed Revised Statutes, 1990, declaring void all laws under color of which peonage should be maintained. But Congress omitted to provide any punishment for enforcing such laws. Void or not, until repealed or Congress provides a special punishment for officers and others who use them for this criminal purpose of producing involuntary service, they are in the way as the main strength of peonage.

In construing the Alabama statute the court will bear in mind that the legislature would naturally seek to accomplish by indirection what it could not do directly. But section 1990 of the Revised Statutes specifically covers such a case. Mere plausibility—which is all we think the statute in question presents—

POOR

is therefore insufficient. Can it be doubted that the statute, as practically construed and applied in this case, at least indirectly enables a system of involuntary service in payment of debt to be established, maintained, and enforced?

Freeman v. *United States* (217 U. S., 539) is in no wise inconsistent with the argument here made against the Alabama statute. The only ground of objection to the Philippine statute involved in that case was that the penalty paid for the misappropriation of the personal property of another went to the creditor and not into the public treasury. We agree that this was clearly insufficient to show that the statute imposed imprisonment for debt, and there was nothing else in the statute to justify any such implication. It clearly and unequivocally imposed a penalty for misappropriating and misapplying the personal property of another. Here the statute imposes no punishment for the fraud condemned unless the debtor fails to perform the service or return the property. The nature of the penalty in this case is only one of a number of incidents that go to show the actual intention of the legislature in enacting this statute. Were the penalty to go entirely to the State, the essential purpose of the statute would not be changed. Reference to the nature of the penalty is made for the purpose of showing that a particular class of contracts is aimed at, rather than as indicating an intention to imprison for debt.

OPY

II.

The judgment in this case, and the statute of Alabama upon which it is founded, are in violation of the Fourteenth Amendment to the Constitution of the United States.

(1) AS DENYING THE DEFENDANT THE EQUAL PROTECTION OF THE LAWS.

It is common knowledge that Alabama is chiefly an agricultural State and that the majority of laborers upon the farms and plantations are negroes.

While the original statute applied generally, the amendments, in terms and by their necessary effect, single out tenants of land and agricultural laborers. Every reported case under the statute, it will be observed, is that of a farm laborer. The maximum penalty fixed by the statute, $300, also makes it peculiarly applicable to this class of laborers.

In *.Ex parte Drayton* (153 Fed., 986), the United States District Court for South Carolina held unconstitutional a statute of that State which provided that—

> any laborer working on shares of crop or for wages in money or other valuable consideration, under a verbal or written contract to labor on farm land, who shall receive advances either in money or supplies and thereafter willfully and without just cause fail to perform the reasonable service required of him by the terms of the said contract, shall be liable to prosecution for a misdemeanor, etc.

The opinion in that case states that the purpose of this statute to coerce agricultural laborers, largely

negroes, into a performance of their contracts of service, was not denied by the Attorney-General of the State, but openly defended on the ground of public necessity.

The court held that it was unnecessary to determine—

> whether a statute declaring it to be a misdemeanor to fail to pay debts, or to perform contracts generally, will fall within the general police powers of the State, for this statute is not of that character. It is directed toward a single class of citizens, which is arbitrarily singled out and punished for failing to perform certain duties.

It is true that in that case the court distinguished the statute of Alabama, *as originally enacted*, from the South Carolina statute, as had been done by Judge Jones in the *Peonage cases*. (123 Fed. Rep., 690.) The distinction was made on the ground that the Alabama statute was general in its nature and "applies to all persons who enter into contracts with intent to injure or defraud, and declares that persons who obtain money with such intent shall be punished as if they had stolen it."

But even if the Alabama statute, as originally enacted, was not to be regarded as class legislation, and was valid, notwithstanding the language it even then contained, showing that its real purpose was to compel personal service in satisfaction of debt, the subsequent amendments, by applying it specifically to tenants of land and changing the punishment so as

R COPY

to make it peculiarly applicable to debtors of the agricultural labor class, and the actual enforcement of the statute against that class of laborers alone, place it on all fours with the South Carolina statute in the respect under consideration.

In this connection the language of this court in *Yick Wo* v. *Hopkins* (118 U. S., 356, 373), in reference to the California laundry ordinance, seems especially pertinent:

> This conclusion, and the reasoning on which it is based, are deductions from the face of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion, that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States.

> Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson* v. *Mayor of New York* (92 U. S., 259), *Chy Lung* v. *Freeman* (92 U. S., 275), *Ex parte Virginia* (100 U. S., 339), *Neal* v. *Delaware* (103 U. S., 370), and *Soon Hing* v. *Crowley* (113 U. S., 703).

The general principles governing the determination of the question whether a State statute is in violation of the equal protection clause of the Fourteenth Amendment are fully stated by Mr. Justice Harlan, in *Connolly* v. *Union Sewer Pipe Co.* (184 U. S., 540, 558), where the antitrust statute of Illinois was held invalid because exempting from its operation agricultural products or live stock while in the hands of the producer or raiser.

In *Gulf, Colorado & Santa Fe Ry.* v. *Ellis* (165 U. S., 151), a statute of Texas which imposed an attorney's fee on railway companies alone was held unconstitutional. Speaking by Mr. Justice Brewer, the court used this language, which seems to be equally pertinent here:

> It is, of course, proper that every debtor should pay his debts, and there might be no

> impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty of payment is more imperative in the one instance than in the other.

We submit that the statute of Alabama, as amended and as construed and applied in this case, singles out a particular class of laborers and, under the guise of punishing fraudulent practices, penalizes a mere breach of contract for the purpose of coercing such laborers into the performance of their obligations. Doubtless the employers of such labor have much to complain of, but this does not relieve the statute of the taint of unconstitutionality. The abuse of personal liberty that a statute so construed and applied would engender is manifest to all.

The situation in this respect is well stated by Judge Jones in his charge to the grand jury in the *Peonage cases* (123 Fed. Rep., 691):

> The "great, general, and essential principles" of government can not be bent or swayed to the prejudice of renters or laborers, who are freemen and citizens, in order to improve the efficiency of our system of labor,

or to avert the disastrous consequences to landlords and farmers which result in every other business in life when the obligations of contracts are not performed or respected. The gap once made by discrimination against laborers and renters, no other class of men would be safe from like discrimination. All other classes of society, alike with landlords and persons engaged in agricultural pursuits, are subject to losses and damages from the unreliability and dishonesty of debtors and employees who fail to perform contracts; but in all free governments the good sense of mankind, since the days when imprisonment for debt was abolished, has condemned and frowned down any attempt to coerce the performance of civil obligations by criminal penalties.

(2) AS DEPRIVING THE DEFENDANT OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS OF LAW.

We shall discuss under this heading the operation and effect of the provision of the Alabama statute making the failure or refusal of the debtor to refund the money or property advanced him to perform the service contracted for, "without just cause," *prima facie* evidence of an intent to defraud his employer.

The general rule that it is within the power of the legislature to prescribe rules of evidence so as to affect the burden of proof, may be admitted. (*Holmes* v. *Hunt*, 122 Mass., 505–517.) But the rule is subject to certain qualifications which are of especial importance in criminal proceedings.

In *People* v. *Cannon* (139 N. Y., 32, 43), where the authorities were collated and examined, Judge Peckham said:

> It can not be disputed that the courts of this and other States are committed to the general principle that even in criminal prosecutions the legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y., 143, *supra*.) The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with the main fact. The inference of the existence of the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof.

The Rhode Island cases, referred to below, were cited by Judge Peckham and distinguished from the statute he was reviewing.

In *State* v. *Beswick* (13 R. I., 211) the clause in a statute providing that—

> * * * the notorious character of any such premises, or the notoriously bad or intem-

POOR

> perate character of persons frequenting the same, or the keeping of the implements or appurtenances usually appertaining to grog shops, tippling shops, or places where such liquors are sold, shall be *prima facie* evidence that said liquors are kept on such premises, for the purposes of sale within the State—

was held unconstitutional. Durfee, C. J., said (p. 217):

> * * * It virtually strips the accused of the protection of the common-law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not "be deprived of life, liberty, or property, unless by the judgment of his peers or the law of the land."

Again, p. 218:

> * * * Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty. "This rule," said Judge Selden, in *The People* v. *Toynbee* (2 Park Cr., 490, 526), "will be found specifically incorporated into many of our state constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase, 'due process of law.'" Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed,

OR COPY

> is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. (See also *State* v. *Kartz*, ib.)

In *Board of Commissioners* v. *Merchant* (103 N. Y., 143, 148), Judge Earl said:

> A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law * * * which made that *prima facie* evidence of crime which had no relation to a criminal act and no tendency whatever by itself to prove a criminal act.

It may be that the absolute or immediate failure or refusal to execute a contract would warrant the inference of an intent to defraud. But where, as here, the performance of the contract is entered upon and continued for a period sufficient to establish good faith, a subsequent breach would support no such inference as to the original intent in making the contract. This was distinctly held by the Supreme Court of Alabama in the *Riley* case, *supra*.

In *Commonwealth* v. *Rubin* (165 Mass., 453) it was held that if the conversion followed hard upon the receipt of the property, it was not unnatural to assume that the felonious intent existed in the beginning.

POOR

There the conversion was immediate, and besides the question was left to the jury, while a rule of law which makes such a fact *prima facie* evidence of guilt in effect concludes the question in the absence of countervailing evidence.

In *Kelly* v. *Jackson* (6 Pet., 622, 631) the court, speaking by Mr. Justice Story, said:

> What is *prima facie* evidence of a fact? It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. The jury are bound to consider it in that light, unless they are invested with authority to disregard the rules of evidence, by which the liberty and estate of every citizen are guarded and supported. No judge would hesitate to set aside their verdict and grant a new trial, if, under such circumstances, without any rebutting evidence, they disregarded it. It would be an error on their part, which would require the remedial interposition of the court. In a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact.

See also to the same effect Greenleaf on Evidence, section 33.

In *Vankirk* v. *Staats* (24 N. J. L., 121, 123) the Supreme Court of New Jersey held that "in order to warrant a commissioner's order to hold to bail for the fraudulent *contracting* of a debt, there must be

OPY

some proof of fraudulent intention at the time of contracting," and that "a subsequent refusal to pay over an account will not warrant an inference of fraud in contracting." The court said:

> But, besides this defect, the affidavits contain no facts from which the commissioner could legally infer that the debt was fraudulently contracted. They do not even prove that the defendant, when he contracted the debt, did not mean to pay it. The most that is shown is, that under various pretenses he refuses to settle. No false statement or fraudulent concealment of his circumstances are alleged, nor is it shown that he made any false representation to induce the plaintiffs to trust him. He simply promised to account and pay, as every man does when he contracts a debt. Fraud in contracting the debt, in the nature of things, means some fraudulent conduct at the time of the contract whereby the other party was deceived.

A similar ruling was made in *Steinhardt* v. *Beir* (60 N. Y. Super. Ct. Rep., 489) and in *Mooney* v. *La Follette* (21 N. Y. App. Div., 510).

In the present case, Bailey entered upon the performance of his contract and worked thereunder for over a month. He had not worked a sufficient time to pay for the money advanced him, however. The facts proved negative any intention to defraud on his part at the time of making the contract and receiving the money. Yet the jury, under the instructions of the court that failure or refusal to perform the act or service, or return the advance,

without just cause, was *prima facie* evidence of an intent to defraud, convicted him, and the court sustained the judgment.

"Where an act, in itself indifferent," said Lord Mansfield, in *Rex* v. *Woodfall* (5 Bur., 2667), "if done with a particular intent become criminal, the intent must be proved and found; but where the act is in itself unlawful, the proof of justification or excuse lies in the defendant, and in failure thereof the law implies a criminal intent." So, an intent to murder is conclusively presumed from the deliberate use of a deadly weapon. (1 Greenleaf on Evd., sec. 18.)

This statute makes acts, in themselves as consistent with innocence as guilt, sufficient evidence of guilt. It presumes guilt as matter of law. And in its practical operation it makes this a conclusive presumption.

By the law of Alabama a person on trial for a criminal offense can testify for himself; but it has been decided that he can not testify as to his uncommunicated purpose or intent, "such mental status, when relevant, being a matter of inference to be determined from the circumstances of the case by the jury." (*McCormick* v. *Joseph*, 77 Ala., 236–240.)

This rule was recognized as applying in this case. (Rec., 18.)

How is the presumption of guilt which this statute impresses upon the accused to be rebutted? It is true that Bailey was not called as a witness. Why call him? What could he testify to? He would have to admit signing the contract, receiving the

COPY

advance, working for a time, failure to refund, and quitting the service. As to anything further, his mouth was closed. The "inference from the circumstances of the case" as to his intent are determined by the presumption of law created by this statute. He is deprived of his right to submit to the jury the thing to be proved—fraudulent intent.

The statute, as construed and applied in this case, takes away from the accused the presumption of innocence. The controlling presumption of guilt raised by it is wholly irreconcilable with the presumption of innocence. These can not exist together without unreasonable confusion. In *Coffin* v. *United States* (156 U. S., 432, 453) Mr. Justice White, speaking for the court, said:

> The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.

This axiomatic and elementary principle is substantially destroyed by the creation of an artificial presumption of guilt, which the accused, under the rule stated, is wholly unable to refute.

The rule of evidence established by the statute receives no assistance from the words "without just cause." Whatever they mean, the fact that a man breaks his contract without just cause, especially after he has begun its performance and continued therein for a period which indicates good faith, has

POOR

no such relation to the making of the contract as to warrant what is, in effect, a conclusive presumption of the existence of a felonious intent in the beginning.

The Supreme Court of Alabama says in this case, that "just cause" is "defensive matter brought forward by the accused, necessarily depending for its sufficiency upon the facts of each case." As pointed out by the same court in holding the act of March 1, 1901, unconstitutional, the existence of an excuse of this kind "could never be known to be available except at the risk of, and at the end of a criminal prosecution." Under such circumstances, the statute would seem to be void for ambiguity. (*United States* v. *Reed*, 92 U. S., 214; 12 Cyc., 142.)

In *The State* v. *Thomas* (144 Ala., 77), the Montgomery City Court held this *prima facie* rule unconstitutional, but was reversed by the Supreme Court of Alabama.

On its face, the statute creates what Greenleaf terms a disputable presumption of law. (1 Greenleaf on Evidence, sec. 33.) But, as construed and applied in this case, the presumption is conclusive, because of the inability of the defendant to testify to his intent otherwise than by the very acts which the law says shall be deemed evidence of guilt.

The rules referred to virtually deprived Bailey of an opportunity to be heard in his defense. The facts—which tended to show his innocence—were, under the rule stated, concluded against him. The jury were not instructed that they might disregard the *prima facie* rule, if they were satisfied, from the

COPY

fact of partial performance, that the defendant entered into the contract in good faith. Both court and jury evidently regarded such fact as of no importance under the rule.

It is true the Supreme Court of Alabama, in its final opinion in this case, said (Rec., 19):

> Again, it must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the contrary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence.

But the trouble with this is, that the *prima facie* rule makes the only acts of the debtor which would go to show his intent, including partial performance of the contract, evidence against him, and all that he can prove is that he broke the contract for just cause—a wholly immaterial matter.

In *Twining* v. *State of New Jersey* (211 U. S., 78, 101), the court, speaking by Mr. Justice Moody, and referring to guaranty of due process of law in the fourteenth amendment, said, that—

> * * * consistently with the requirements of due process, no change in ancient procedure can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation

> to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.

In that case the court refers to notice and opportunity to be heard as one of "the fundamental conditions which seem to be universally prescribed in all systems of law established by civilized countries."

Can anyone read the record in this case and escape the conclusion that, by the operation of the rules of evidence referred to, Bailey has been condemned without a hearing? It is true he was brought into court and a jury impaneled to try him. But, by the rules stated, the facts which show his innocence were converted into evidence of guilt, and he was forced to stand mute, while under the forms of law he was deprived of his liberty.

GEORGE W. WICKERSHAM,
Attorney-General.

WILLIAM R. HARR,
Assistant Attorney-General.

O

R COPY

Office Supreme Court, U. S.
FILED.
OCT 6 1910
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States.

October Term, 1910

No. 300.

ALONZO BAILEY, *Plaintiff in Error.*

vs.

THE STATE OF ALABAMA.

BRIEF OF EDWARD S. WATTS, FOR PLAINTIFF IN ERROR.

DANIEL W. TROY,
Montgomery, Alabama,
Of Counsel.

The Brown Printing Co., Montgomery, Ala.

Supreme Court of the United States.

October Term, 1909.

No. 564.

ALONZO BAILEY, *Plaintiff in Error.*

vs.

THE STATE OF ALABAMA.

Brief for Plaintiff in Error.

STATEMENT OF THE CASE.

This is a writ of error at the instance of Alonzo Bailey to reverse a judgment of the Supreme Court of Alabama affirming a judgment of the City Court of Montgomery under which he was convicted of violating section 4730, Code of Alabama, 1896, as amended and now shown as Section 6845, Code of Alabama, 1907, and generally called the "Labor Contract Laws." Bailey was arrested on April 14, 1908. By a writ of *habeas corpus* he sought his liberty, first through the Judge of the City Court of Montgomery, then by appeal to the Supreme Court of Alabama, and later by writ of error in this court. (Record No. 538, filed Sept. 1, 1908.) In December, 1908, this Court, with Messrs. Justice Harlan and Day dissenting, declined to pass

upon the merits of the case. (211 U. S. 452.) Afterwards, being tried and convicted by the City Court of Montgomery under an indictment, the validity of which was unsuccessfully challenged by a motion to quash and by a demurrer, and at which trial the general affirmative charge was given in favor of the State and a like charge refused in his favor, he appealed to the Supreme Court of Alabama. His conviction being affirmed, Bailey then sued out this writ of error. (Record No. 564, filed Aug. 4, 1909).

The motion to quash, the demurrer, exceptions to charges and the charges requested raised the constitutionality of said Section 4730, as amended. Record p. 2, 4, 12, 13, 28 and 38).

The said section 4730 was amended by the General Acts of 1903, page 345, so as to read as follows: (Amendment shown in italics.)

> "Section 4730. Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service; and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses *or fails* to perform such act or service, must on conviction be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

The said amended statute was further amended by the General Acts of 1907, page 636, so as to read as follows:

"Section 4730. Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal propery from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished *by a fine in double the damage suffered by the injured party, but not more than* $300, *one-half of said fine to go to the county and one-half to the party injured; and any person, who, with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not for more than* $300.00, *one half of said fine to go to the county and one-half to the injured party.* And the refusal or failure of any person, who enters into such contract, to perform such act or service or *to cultivate such land,* or to refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*"

On the trial, H. C. Borden, the only witness, testified that on December 26, 1907, he was manager of the Riverside Company; that on such day defendant entered into a contract in writing with the Company agreeing

OOR COPY

to perform personal services for the year 1908; that at the time of the execution of said contract defendant obtained from the Company the sum of $15 in money; that on or about January 1, 1908, defendant began to work under the contract and continued to do so for a month and three or four days; that the defendant then, without "*just cause*" and without refunding the money, ceased to work for said Riverside Company; that since that time he performed no services for said Company in accordance with or under said contract and refused and failed to perform any further service thereunder, and without "*just cause*" refused and failed to refund said $15.00; that said Alonzo Bailey is a negro; that no other person was present at the execution of the said contract except the witness and the defendant. The witness did not testify as to any bad faith on the part of the defendant. Record, p. 11).

SPECIFICATIONS OF ERROR.

1. The said Supreme Court of Alabama erred in affirming the judgment of the Court below.

2. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below, and remanding said cause to the City Court of Montgomery for further proceedings.

3. The said Supreme Court of Alabama errer in not reversing the judgment of the Court below and directing the discharge of plaintiff-in-error.

4. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the motions of plaintiff-in-error to quash the indictment against him.

5. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers filed by the plaintiff-in-error to the indictment against him.

6. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him on ground No. 1. Record, page 5.)

7. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him on ground No. II. Record, page 5.)

8. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (1) and which was excepted to by the plaintiff-in-error. (Record, pages 12, 28, 38.)

9. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (2) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 38.)

10. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (3) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 39.)

11. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error, called Charge No. 1. Record, pages 13, 29.)

12. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 2. (Record, pages 13, 29.)

13. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plain-

COPY

tiff-in-error called Charge No. 3. (Record, pages 14, 29.)

14. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 4. (Record, pages 14. 30.)

15. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 5. (Record, pages 14, 30.)

16. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 6. (Record, pages 14 30.)

17. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 7. (Record, pages 14, 30.)

INTRODUCTION.

This case represents a question which involves the liberty and rights of thousands of citizens.

The act appears to have been adopted solely for the benefit of the employer and landlord. The employe and tenant are singled out with burdens imposed upon no other class of individuals. They cannot go to the court with equal right and equal protections. Even peonage did not go so far as to subject only the peon, but bore on the master also.

While this act in appearance is general in effect it applies only to that form of service rendered by the commonest laborer or the poorest tenant of farmlands. It contemplates contracts where the amount involved is $150.00 or less. It contemplates advancements of money or personal property to laborers and poor tenants. As a matter of common knowledge in Alabama, such laborers and such tenants are, as a class, negroes —Alabama ranks third in negro population. As a rule they rely solely for support upon the advances, and are dependent upon and practically at the mercy of the employer. The statute has been befriended on the theory that the laborer is without financial responsibility and cannot be reached by ordinary remedies of judgment and execution for breach of civil contract. The natural and reasonable effect of this statute is bad, being nothing more than to clothe the master or employer with a coercive weapon by which he may send to jail or the chain gang an employe who fails to perform the services required by the contract or to refund the advances. The law provides no means for determining the justice of the excuse for failure to perform or refund, until the employe first risks the penalty of hard labor by quitting the contract. The Legislature has not defined "just cause."

COPY

In many instances, the employe, in the beginning, has been convicted of a misdemeanor by a Justice of Peace. A labor employer anxious to get laborers whom he can compel to remain, is advised of the conviction. The laborer is glad to have someone pay his fine. He enters into a contract, in consideration of the payment of the fine, to work for a definite time and until the fine is refunded to his employer. If he quits work under the contract without refunding the advance a warrant is sworn out against him. He is captured, and if he refuses to return to work (provided the employer is willing) or refuses to refund the advances the failure to pay or to perform the services is proved and a conviction follows. The fine is collected by the State and the employer is paid the amount of the indebtedness. This not only includes the original advancement, but also any other advancement or any damage which may be suffered by the employer.

Sections 6848-7, Code 1907, provide that a defendant being convicted of a misdemeanor, who procures another to act as his surety on a confession of judgment for the fine and costs, and who, in consideration therefor, agrees to do any act or service for such person, and who, after being released on such confession fails or refuses without good and sufficient excuse, to perform such service, must on conviction be fined not less than the amount of the damages suffered by the surety, but not more than $500.00. The next several sections provide against interfering with hiring, employing or enticing away any apprentice, laborer, servant, renter or share-cropper, who has contracted in writing to serve another, without the consent of the employer, and a *prima facie rule* of evidence of guilt is created against any person who, after the execution of such contract, employs any such laborer, servant, renter or share-cropper, and fails or refuses to forthwith discharge

such employe after having been notified of such former employment. With such facilties for getting in debt is the laborer provided.

The labor contract is usually short and contains few stipulations. The employer often promises verbally a good house, good food and other conveniences and necessities. His failure to keep these verbal promises cannot be an excuse for the employe's refusing to perform the written contract, as its terms cannot be varied by parol.

Mr. Chas. W. Russell, Assistant Attorney General, in his Report on Peonage, said:

> "I have no doubt, from my investigations and experiences, that the chief support of peonage is the peculiar system of State laws prevailing in the South, intended evidently to compel service on the part of the workingman.
>
> "From the usual condition of the great mass of laboring men where these laws are in force to peonage is but a step at most. In fact, it is difficult to draw a distinction between the condition of a man who remains in service against his will, because the State has passed a certain law under which he can be arrested and returned to work, and the condition of a man on a near-by farm who is actually made to stay at work by arrest and actual threats of force under the same law."

As said by Justice Jones, in Peonage Cases, supra, of the forerunner of Section 4730—equally apt to the present statute:

> "The evils of the system not only degraded those who were subject to the system, but exercised a baleful influence upon all other classes which, in innumerable ways fought against the industrial

COPY

prosperity and moral advancement of the people among whom 'the system' was enforced."

30 Cyc. p. 1384.

The purpose and effect of the first section of the Fourteenth Amendment to the Constitution of the United States, as stated in United States vs. Harris, 106 U. S. 629, was clearly defined in United States vs. Cruikshank, 1 Wood 316, as follows:

"It is a guaranty of protection against the acts of the State Government iself. *It is a guaranty against the exertion of arbitrary and tyranical power on the part of the government and legislature of a state.*" It furnishes an "additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society."

United States vs. Cruikshank, 92 U. S. 542.
United States vs. Lee, 106 U. S. 196.

DUE PROCESS OF LAW.

The act as amended is unconstitutional and void in that it violates that part of the Fourteenth Amendment of the Constitution of the United States which provides that no state shall make or enforce any law which shall deprive any person of life, liberty or property "without due process of law."

In the case of Darmouth College vs. Woodward, 4 Wheaton U. S. 518-581, which has been relied upon, probably more than any other authority, to throw light upon and to explain the rights and protection derived from the grant of the Government, Webster, in his

argument, quoted from Lord Cope's Explanation of the 29th Chap. of Magna Charta:

> "'No man shall be disseized, etc., unless it be by the lawful judgment, that is, verdict of equals, or by the law of the land, that is (to speak it once for all), *by the due course and process of law.*'"

He then said:

> "By the law of the land is most clearly intended the general law; *a law which hears before it condemns;* which proceeds upon inquiry, and renders judgment only after trial. The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society. *Everything which may pass under the form of an enactment, is not, therefore, to be considered the law of the land.*"
>
> "Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend directly to establish the union of all powers in the legislature. There would be no general permanent law for courts to administer, or for man to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees; not to declare the law, or to administer the justice of the country."

In Wright vs. Cradlebaugh, 3 L. Ed. 341, it was held that "due process of law" requires that a party shall be properly brought into court, and when there, shall have a right to set up any lawful defense.

R COPY

In Hubey vs. Reiley, 53 Pa. (3 P. F. Smith) 112, it was held that "due process of law" includes an opportunity to answer.

Clark vs. Mitchell, 64 Mo. 564, said "due process of law" means a law which hears before it condemns.

Both as a matter of law and fact, every person is presumed to be innocent until his guilt is proved beyond a reasonable doubt and it is the high and solemn duty of the court to see that all elements of the crime are proved or that testimony is adduced which justifies the jury in finding these elements.

Clyatt vs. United States, 197 U. S. 207-222.

On account of a rule of evidence in Alabama which prevents a person from testifying as to his uncommunicated motives, purposes or intent, plaintiff-in-error was unable to show by his own testimony that he entered into the contract in good faith and that he rescinded the contract for reasons other than those constituting a crime.

In McCormick vs. Joseph, 77 Ala. 236-240 it is said:

> "It is well settled in this State, whatever the rule may be elsewhere, that witnesses are not permitted to testify to their motive, belief or intention, when secret or uncommunicated; such mental status when relevant, being a matter of inference to be determined from the circumstances of the case by the jury."

Holmes vs. State, 136 Ala. 80-84.
Bailey vs. State, 49 So. (Ala.) 886.
Johnson vs. State, 102 Ala. 1-16.
Brown vs. State, 79 Ala. 51-54.
Harrison vs. State, 78 Ala. 5-11.
Alexander vs. Alexander, 71 Ala. 295-8.

POOR

Burns vs. Campbell, 71 Ala. 271-291.
Burke vs. State, 71 Ala. 377-382.
Wheeless vs. Rhodes, 70 Ala. 419-421.

There was no witness to the execution of the contract by whom plaintiff-in-error could prove his good faith, nor was there any witness to the rescission of the said contract by whom he could prove that he terminated the contract for reasons other than those constituting a crime. Any declaration made by him as to his motives either in entering into the contract or in failing or refusing to perform said contract was inadmissible as evidence in his favor on the trial, for it has been established in Alabama that a defendant cannot thus make evidence for himself.

Harkness vs. State, 129 Ala. 71.

The legislature further denied "due process of law" when it amended said statute so as to authorize the court to convict of fraud on no other evidence than that, of the execution of a contract, the failure to return the consideration therefor, in case of its breach or the failure to perform the services provided for in the said contract.

In State vs. Norman, 14 S. E. (N. C.) 968, the Court said:

> "In order to convict, the State must show to the full satisfaction of the jury, something more than obtaining the advances, a promise to work or pay for the same, and a breach of that promise. Nothing else being shown, these facts would constitute only a breach of contract, and for this the defendant could not be prosecuted criminally."

This case was quoted with approval in State vs. Williams, 63 S. E. (N. C.) 949, a case declaring a labor contract law unconstitutional.

COPY

Under Section 4730, Code 1896, (and section 3812, Code 1886), before the amendment, a conviction was had with difficulty, as it was necessary to prove that accused entered into the contract with intention to injure or defraud the employer and refused to perform with like intent and without "just cause," and without evidence from which such inference might be drawn the jury was "not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance." The court could "not permit the lack of evidence on a material point to be supplied from the imagination of the jury."

Ex parte Riley, 94 Ala. 82;
Dorsey vs. State, 111 Ala. 40;
McIntosh vs. State, 117 Ala. 128.

Does the execution of the contract in any way tend to prove a crime? Does the failure to return the consideration, in case of breach, tend to prove a crime? Does the failure to perform services under the contract tend to prove a crime? If not, do the three combined any more tend to prove a crime? They have no tendency to prove a crime and could support only a civil action.

The act makes conduct, after the contract has been partly performed, *prima facie* proof of an intent to defraud from the beginning. Is this conduct necessarily inconsistent with good faith? If not, the act is void.

The first amendment to said Section 4730 (ante p. 2.) was first passed upon by Judge William H. Thomas of the City Court. The portion of the statute declaring the rule of evidence was declared unconstitutional. The State appealed to the Supreme Court and at a rehearing, at which the State was represented by the County Solicitor and the Attorney General of the

State, and at which the defendant was not represented, the trial court was reversed.

The authorities upon which the decision was based decided a general proposition of law and should not have been construed to govern the case presented. It is evident that the Supreme Court did not investigate the exceptions.

The first authority presented, 8 Cyc. p. 820, states a rule of evidence which is probably universally upheld.

> "The legislature has the power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings, it may declare what shall be *prima facie* evidence. On the other hand, it cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary."

In State vs. Beach, 147 Ind. 74, the second case cited in the Thomas Case, the act under which the indictment was had is as follows:

> "That if any banker * * * shall receive * * * any money when the bank is insolvent whereby the deposit shall be lost * * * said banker shall be guilty of embezzlement. Involuntary liquidation within thirty days shall be prima facie evidence of an intent to defraud."

In this case, the holding himself out as solvent and as being able to meet all obligations, when in fact he was insolvent and unable to pay his creditors, is wrong and tends to show a fraud. These facts which tend to show a criminal intent were made *prima facie* evidence of an intent to defraud. The defendant had an opportunity to overcome the evidence by the introduction of outside evidence.

COPY

In this case there was a conviction of the defendant and the Court in showing that the acceptance of the deposit by the defendant was in no manner construed as *prima facie* of the intent to defraud said:

> "A law which provides that certain facts are conclusive proof of guilt would be unconstitutional as *also would one which makes an act prima facie evidence of a crime which has no relation to a criminal act.*"

The third authority mentioned in the Thomas case was Meadowcraft vs. People, 163 Ill. 56.

This case construed a like statute to the one in the Indiana case. The court took the same view of the law as was taken in the Indiana case.

Fong vs. United States, 149 U. S. 729, the next case cited in the Thomas case, did not authorize the creation of a *prima facie* rule of evidence therein. The Court Said:

> "The reason for requiring Chinese aliens claiming the privilege of remaining in the United States to prove the fact of his residence here, at the time of the passage of the act, 'by at least one credible white witness,'" was on account of the "suspicious nature in many instances, of the testimony offered to establish the residence of the parties, arising from the loose notion entertained by the witnesses of the obligation of an oath."

The next authority in the Thomas case is Wigmore on Evidence, which states about the same general rule of evidence as is given above.

The next and last authority cited in the Thomas case is State vs. Boswick, 13 R. I. 211, which throws no material light on this question.

An investigation of the large number of decisions upholding the rule that "the legislature has the power to give greater effect to evidence than it possessed at common law" will show clearly the exception that "the legislature cannot hold an act *prima facie* evidence of a crime which has no evidence to show a criminal act." In other words, the legislature cannot by its arbitrary will draw from a perfectly innocent act, or one warranted by law and which any one might lawfully do, an unlawful, improper or criminal intent.

The legislature under the guise of enacting a *prima facie* rule of evidence, fixed a conclusive one, and by so doing plaintiff-in-error was denied the opportunity of establishing his case of defense. The act of the legislature creating the rule of evidence denies "due process of law" and is void."

Harvey vs. Elliott, 167 U. S. 409.
Ex parte Well, 107 U. S. 289.
Gaplin vs. Page, 85 U. S. 350.
Dartmouth College vs. Woodward, 4 Wheaton 518.

The said amended statute further denies "due process of law," in that, there is an attempted substitution of the judicial department of the State government for the legislative.

To raise a *prima facie* case (which most invariably esmtablishes the guilt and without which the plaintiff in error could not have been held) it must be shown that the defendant refused or failed to perform the contract "without just cause." What constitutes "just cause"? The legislature, contrary to its duty, has not defined it. No attorney can advise what constitutes it. No man can tell whether or not he is within the limits of the law, as different juries mighmt reach different conclusions under the same state of facts. Whether or not one

COPY

should be burdened with a *prima facie* case depends upon the view reached by the jury, which depends upon elements which no man, with certainty, can foresee. There is no criterion laid down by the statute by which one can regulate his actions so as to know that he is abiding by the law.

In United States v. Reese, 92 U. S. 214, cited with approval by Mr. Justice Brewer in James v. Bowman, 190 U. S. 127-140, the Court said:

> "A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution * * * *Every person should be able to know with certainty when he is committing a crime.* * * *
>
> "It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who would be rightfully detained and who would be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government."

In James v. Bowman, supra, the court said:

> "A criminal statute should define clearly the offense which it purports to punish."

In Chicago & N. W. Ry. Co. v. Dey, 35 Fed. Rep. 866-876, it was contended that a statute was unconstitutional which was to punish criminally where an "unreasonable" charge was made. The court said:

> "If this were the construction to be placed upon this act as a whole, it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in

POOR

advance what he may and what he may not do under it."

In Tozer v. United States, 52 Fed. Rep. 917-919, the Court said:

> "In order to constitute a crime, the act must be one which the party is able to know in advance whether it is criminal or not. *The criminality of an act cannot depend upon whether a party may think it reasonable or unreasonable.*"

In L. & N. R. R. Co. v. Commonwealth, 35 S. W. Rep. 129, the Court, in construing a statute punishing criminally "for charging more than a just and reasonable rate." The Court said:

> "That this statute leaves uncertain what shall be deemed a "just and reasonable rate or toll or compensation' cannot be denied; and that different juries might reach different conclusions, on the same testimony, * * * must also be conceded. The criminality * * * depends on the jury's view of the reasonableness of the rate charged. * * * There is no standard whatever fixed * * * by which the carrier may regulate its conduct. And it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury; and especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime. * * * 'One jury may convict for a charge made on a basis of 4 per cent., while another might acquit an accused who had demanded and received at a rate of 6 per cent.' "

OPY

EQUAL PROTECTION OF THE LAWS.

"Equal protection of the laws" prohibits class legislation where unreasonable and where imposing arbitrary, unjust or odious discrimination. For example, laws imposing attorneys' fees upon one party to a suit and not upon the other; Gulf, S. & S. F. R. Co. vs. Ellis, 165 U. S. 150; laws imposing unusual penalties upon one party to a contract but not upon the other; Ex parte Hullman, 60 S. E. (N. C.) 20, Peonage Cases, 123 Fed. 671; Ex parte Brayton, 153 Fed. 986; laws fixing the limit of punishment to be imposed upon one party; to a contract, but fixing no limit as to the other party; State vs. Williams, 32 S. C. 123, and laws excluding laundries from certain localities regardless of location or appliances used; in re Stockton Laundry Co. Cases, 26 Fed. 611; in re Sam. 31 Fed. 681.

If the said statute as amended, approved August 15, 1907, provides for punishment only in cases of fraud, it is repugnant to that part of the Fourteenth Amendment of the Constitution of the United States which provides, that no state shall deny to any person within its jurisdiction the "equal protection of the laws," in that, it applies only to a person who "enter into a contract in writing for the performance of service, and thereby obtains money or other personal property," and who "enters into a contract in writing for the rent of land and thereby obtains any money or other personal property." All others are indulged with the presumption of honesty and fair intentions and nothing else.

> "This is a criminal statute aimed solely at those who enter into contracts to perform personal service."
>
> Harris vs. State, 47 So. (Ala.) 341.

The said act is further repugnant to the said Amendment in that it does not bear equally upon the employe and employer and equally upon the tenant and landlord. The employer could, without "just cause" and without paying the employe the amount, if any, due him, discharge him, and the landlord without "just cause" could fail to comply with his part of the rental contract and would not be imposed with any unusual burdens, while if the employe or tenant fails to comply with his part of the contract, that fact is made *prima facie* evidence of an intent to injure or defraud his employer or landlord.

The said act is further repugnant to the said Amendment, in that it takes a partial , unjust and odious discrimination in favor of the employer and landlord, in that, the employe or tenant is empowered with no unusual recourse against the employer or landlord to aid him in the collection of what, if any, amount is due him under the contract; while the employe or tenant is subject to "imprisonment for debt" (a penalty imposed on no other debtor by the laws of Alabama) if he fails to pay what he owes.

> The said amended act provides, *"The fine is double the damages suffered by the injured party,* but not more than $300.00, one-half of said fine to go to the county and *one-half to the party injured."* (The employer or landlord.)

The Supreme Court of Alabama in Carr vs. State, 106 Ala. 35-37, construing an act which provides that, where any banker received a deposit, knowing of his insolvency, he was guilty of a misdemeanor, which was punishable by a *fine in double the amount of the deposit, one-half of which was to be paid to the depositor;* said:

"The statute, it is insisted for the appellant, is violative of Art. 1, Section 21 of the Constitution of the State, which provides: 'That no person shall be imprisoned for debt.' It is to be observed in the outset that this provision of the organic law is essentially different from the provisions on this subject in many other state constitutions, *in that it contains no exception of 'Cases of Fraud.'* * * * *the elimination of the exception as to frauds was a pregnant omission, which left the guaranty of immunity from imprisonment to the debtor to apply to all cases of debt, whether they involved fraud or not.* * * * *This one* (the act) *cannot be read without conviction that its purpose is to impose imprisonment for debt and to coerce the payment of a debt by the duress it authorizes.* Its requirement that the fine shall be paid only in money, that it shall be *double the amount deposited, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit*, tends, at least, to show that coercion of payment of the debt which the depositary owed the depositor * * * to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of the enactment of the statute."

In Harris vs. State, supra, the Supreme Court held that the offense is condoned if the debt is paid or tendered at any time before the trial; that "an essential element of the offense created was that the employed person abandoned the service without first refunding such money." In this case the amount advanced was $3.00. The County Court of Montgomery, using the same reasoning, cases Nos. 1279 and 1290, State vs. Ben Ward and Hub Ward, violating a written contract

(both white men) held that a statement in open court by the employer, who first insisted upon a prosecution, that he then desired no prosecution would purge the offense. Our courts recognize the offense as being against the individual and not against the State; and the sole measure of graveness of the crime is the damage to the master.

It is of interest to note that there is today pending in the Circuit Court of the United States for the Middle District of Alabama a prosecution for peonage against the employer of the Wards, on account of the holding under the labor contracts.

As said in Ex Parte Holman, infra, "the mere receipt of the money or supplies advanced by the employer cannot make the employe anything more than a debtor * * * and, without doubt the repayment of the money on the value of the supplies advanced puts an end to * * * the obligation * * *."

In Peonage Cases, 123 Fed. 671, an act, General Acts Alabama, 1900-1, p. 125, the forerunner of Section 4730 as amended, was declared unconstitutional, which made it a penal offense, where any one who has contracted in writing to labor or serve another, or who has leased or rented lands for any specified time, should without the consent of the other party and without sufficient excuse, to be adjudged by the court, fail to carry out such contract, and take employment of a similar nature without giving notice of the prior contract. On page 688 the Court said:

> *"It is a vicious species of class legislation. Its criminal penalties are grafted only upon contracts between laborers and renters on farm lands, and their hirers or landlords. It is designed solely in the interest of the employer or landlord. The latter may discharge the laborer or renter, or fail to come up to promise to him, without sufficient excuse; yet*

this legislation gives the renter or laborers no unusual recourse against his employer or landlord, while, in effect, though not in name, it pronounces practical outlawry, in favor of the landlord, against laborers or renters, regarding their right to labor and pursue their accustomed vocations, by attaching special and extraordinary penalties to their breaches of contract with landlords and employers."

* * *

'It is manifestly contrary to the first principles of civil liberty and natural justice, and to the spirit of our institutions and laws, that one citizen shall enjoy privileges and advantages which are denied to all others under like circumstances; or that one shall be subject to losses, damages, suits or actions from which others under like circumstances are exempted.' Holden vs. James, 11 Mass. 396, 6 Am Dec. 174."

In Ex parte Brayton, et al., 153 Fed. 986, the Court in construing a North Carolina statute very much in the nature of the Alabama statute construed in 123 Fed. 671, took the same view as was taken in the Peonage Cases.

In William Adair vs. United States, 208 U. S. 161, a statute forbidding the discharge of an employe because of membership in a labor organization, was held unconstitutional. Mr. Justice Harlan, who delivered the opinion, said:

"The general right to make a contract in relation to his business is part of the liberty of the individual, protected by the Fourteenth Amendment of the Federal Constitution. Allgeyer vs. Louisiana, 165 U. S. 578, 41 L. Ed. 832, 17 Sup. Ct. Rep. 427. * * * *"In all such particulars the employer and the employee have equality of right, and any*

legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

In Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150, cited with approval in Collins vs. Godard, 183 U.S. 79, and in Connoly vs. Union Sewer Pipe Co., 184 U. S. 540-560, by Mr. Justice Harlan, and in Magoun vs. Illinois Trust Company, 170 U. S. 283-294, by Mr. Justice McKenna, Mr. Justice Brewer in delivering an opinion in reference to "equal protection of the laws" and against the constitutionality of the Texas statute imposing an attorney's fee upon a railroad corporation, in addition to costs, which omitted to pay certain claims within a specifed time, on page 153, said:

"The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equal with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fee of the successful plaintiff; if it terminates in their favor they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. *They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties, they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection."*

Then further, on page 159, said:

> "No language is more worthy of frequent and thoughtful consideration than those words of Mr. Justice Mathews, speaking for this court, in Vick Wo vs. Hopkins, 118 U. S. 356-369 (30; 220; 226): 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.' * * * *No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.*"

On page 153, Mr. Justice Brewer also said that even "slight approaches or slight deviations from legal modes of procedure" should be checked. "This can only be obviated by adhering to the rule that constitutional provisions for the security of personal property should be liberally construed."

See, also:

> Chair Co. vs. Runnels, 77 Mich. 105;
> Wilson vs. Railroad Co., 70 Mich. 384.

En parte Hollman, 60 S. E. (S. C.) Report, 20, is a case in which the constitutionality of a South Carolina statute was questioned. The said act provided that any laborer working for a consideration, and who received advances and thereafter willfully and without just cause, failed to perform the services, should be liable to prosecution for a misdemeanor, provided that the con-

tract was witnessed by at least two credidible witnesses. The court held the act to be unconstitutional. The court, in its opinion, said:

> "The farmer makes large expenditures * * * on the faith of the labor contract; and if those whom he engaged act in bad faith, in leading him to depend upon their labor, and make advances to them, with no intention of rendering the service expected, much loss is incurred. So, also, if the dishonest landlord secures the labor of those he employs, with a fraudulent intent no to pay for their work. * * * Hence it seems not unreasonable for the General Assembly to guard against fraud and enforce honesty in such contracts by special sanction. But *even if this statute provides punishment only for fraud in such cases, it violates the Fourteenth Amendment of the Constitution of the United States* and * * * of South Carolina, *in that it does not bear equally on the landlord and laborer.* The parties to a contract are entitled to equal sanction of the law for the protection and enforcement of their rights under it. * * * Equal protection embraces the right of equal exemptions."

The Court, on this point, cited:

> Connoly vs. Pipe Co., 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679;
> Barbier vs. Connolly, 113 U. S. 27, 5 Sup. 357, 28 L. E. 923;
> Peonage Cases, 123 Federal, 686.

It is, of course, proper that Bailey should have performed his part of the contract, or should have placed the other party in statu quo. But it is more im-

proper and unjust to have him burdened as the said amended act provides.

Cotting vs. Godard, 183 U. S. 79;
Gulf, C. & S. F. R. Co. vs. Ellis, 165 U. S. 150-159;
Jim Leeper vs. State of Texas, 139 U. S. 462;
Bell's Gap R. Co. vs. Penn., 134 U. S. 232-237;
Vick Wo. vs. Hopkins, 118 U. S. 356-369;
Barbier vs. Connoly, 113 U. S. 27-31.

ERROR OF THE SUPREME COURT OF ALABAMA.

It is insisted that the learned Court erred and denied plaintiff-in-error "due process of law:"

I. In holding that it is "within legislative competency to prescribe, as a rule of evidence, that the refusal or failure of a person, who enters into a contract, such as is contemplated by the statute, to perform the act or service stipulated for, or to pay for the property obtained under such contract, shall be taken as *prima facie* evidence of the intent to defraud." Supra, p. 12 et seq.

II. In not holding that the *prima facie* rule of evidence created by the amendments to said statute denied "due process of law."

Without witnesses and without the right to testify as to uncommunicated purpose or intention, can circumstances be imagined which could be proved, and which would negative the presumption created by the *prima facie* rule. Supra, p. 12 et seq.

III. In holding that the acts made *prima facie* evidence of intent have a relation to a crime.

The learned Court adhered to the erroneous conclusion reached in the Thomas case and discussed, supra, page 14 et seq.

IV. In holding that the failure of the legislature to define "just cause" did not avoid the statute. It is admitted that what is "just cause" is left to the Court and Jury. Supra, p. 17 et seq.

The important point seems to have been overlooked that the employe who enters a contract with the most innocent intention may, by his breach, be immediately burdened with a presumption of fraud from its execution.

The learned Court erred in holding that said section 4730 amended did not deny the "equal protection of the laws:"

I. In holding that although "this is a criminal statute aimed solely at those who enter into contracts to perform personal service" (Harris Case, Supra) it is valid.

II. In holding that although the criminal features of the statute do not apply to the employer, the statute is good.

III. In holding that said section, as amended, did not violate the 20th section of the Bill of Rights which provides that on person shall be imprisoned for debt. It will be noted that this section contains no exceptions of debt contracted by fraud. (Carr case, supra) While there is no provision against imprisonment for debt in the Constitution of the United States, yet, it is submitted that the failure to extend to plaintiff-in-error the protection created by said section denied "equal protection of the laws." In Green vs. State, 73 Ala. 26-37, the same Court said, of violations of the Fourteenth Amendment, "such violation is complete, whenever an injurious discrimination is expressed in a statute, or is shown in an official act of the executive of the State, or before the judicial department of last resort, when the question comes before the one or the other for official and final action."

The Court erred in not holding that the amended statute enforced involuntary servitude not in punisnment of a crime, and violated the peonage statutes. If the statute is bad there is nothing to authorize the holding of the plaintiff-in-error, and the holding is involuntary. Infra, p. 31, et seq.

INVOLUNTARY SERVITUDE.

It is further submitted to the Court that the identical result is obtained under said amended statute which was obtained under the "System of Peonage."

In New Mexico, at the time of the passage of the Peonage Statute (Section 1990 and 5526 Revised Statutes) there existed a system of labor inherited from Spain which was commonly known as "Peonage." The system, however, was not known as "Peonage" by the laws of New Mexico but as a relation of master and servant. Peonage was not slavery as formerly existed in this Country. The peon was a free man possessing both civil and political rights. The essentials of the Peonage contract were consent of parties, the thing or service contracted for, the duration of the contract and the consideration therefor. After entering into the contract, the peon became bound to the master "for an indebtedness founded upon an advancement in consideration of service." The Peonage Contract could be rescinded only by mutual consent, by payment of the indebtedness or on account of some grave injustice. If the peon refused to fulfill his part of the contract "the court would compel him to pay the principal and interest to the other, and might order the sheriff to contract the service of the peon to the highest bidder. The same proceedings could be had against the master if he failed to pay what he was ordered."

Peonage sanctioned involuntary servitude as an obligation growing out of a contract; if sanctioned the exercise of a dominion over the person and liberty of the peon by the master to coerce a liquidation of the obligation under the contract. Even if the entering into the peonage system was voluntary, it became involuntary the moment the peon desired to withdraw and was coerced to perform the services against his will.

Peonage Cases, 23 Fed. 673;
Jaremillo vs. Romeo, 1 N. M. 190.
Cyc. Vol. 30, p. 1382, et seq.

The essentials of the Labor Contract under the Alabama Statute are, mutual consent of parties, the services contracted for or the land rented, the duration of the contract and the consideration therefor. After entering into the contract, the employe becomes bound to the employer "for an indebtedness founded upon an advancement in consideration of service." The contract can be rescinded only by mutual consent, by payment of the indebtedness or on account of some injustice on the part of the employer or on account of inability to perform. If the employe fails or refuses to fulfill his part of the contract he is taxed with and forced to overcome a presumption of fraud and in case of his conviction, which invariably happens, the sheriff collects for the employer, from the fine of the employe, the principal and interest due under the contract. The same proceedings cannot be had against the employer if he fails to comply with the terms of his contract.

The Labor Contract sanctions a presumption of intent to defraud as an obligation growing out of the contract and enforces involuntary servitude by virtue of the presumption. The provisions of the amended statute constitutes a coercive weapon which enables the employer or landlord to send to hard labor or jail the employe or tenant who refuses or fails to discharge the obligations under the contract. Legally whatever may be the status, otherwise, the entering into the contract is involuntary since the Peonage statute forbids consent.

Such petty differences should not be tolerated. The statute should be read so as to reach its general and ordinary effect. This statue we submit is one of the class

referred to in 30 Cyc. 1387, as used in various ways to uphold peonage and other kinds of involuntary servitude. Some are vagrancy laws, some contract or employment laws, some fraudulent pretense or false promise laws and there are divers others.

> "'Peonage,' within the meaning of the statute, may be defined as 'the holding of any person to serve for labor for the purpose of paying or liquidating an indebtedness due from the laborer or employe to the employer, when such employe desires to leave or quit the employment before the debt is paid off.' * * * *It forbids* slavery and *involuntary servitude*, however attempted, *whether created by contract*, by criminal individual force, or by municipal ordinance or *state law, and in whatever form, or however named. It is immaterial whether the contract whereby the laborer is to work out an indebtedness due from him to the employer is entered into voluntarily or not.*"
>
> Cyc. Vol. 30, p. 1385.

The said amended statute, in violation of the Thirteenth Amendment, enforces involuntary servitude not in punishment to a crime, and is also repugnant to the Peonage Statutes in that said amended statute violates the Fourteenth Amendment and is, therefore, unconstitutional and void and in no manner authorizes the holding of the plaintiff in error.

> Clyatt vs. U. S. 197, U. S. 207;
> Ex parte Hollman, 60 S. E. (S. C.) 20;
> Ex parte Brayton, et al., 153 Fed. 986;
> In re Lewis, 114 Fed. 963.
> Cyc. Vol. 30, p. 1382.

CONCLUSION.

It is respectfully insisted that the amendments to Section 4730 are repugnant to that part of the Fourteenth Amendment to the Constitution of the United States which guarantees "due process of law" and "equal protection of the laws" and it is equally repugnant to the Thirteenth Amendment and to the Peon age Statutes, and that the section as it appeared, prior to the amendment, in the Code of 1896 is likewise bad. The trial court should be reversed and plaintiff-in-error discharged.

Respectfully submitted,

Edward S. Watts

Attorney for Plaintiff-in-Error.

DANIEL W. TROY,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 382.

ALONZO BAILEY, PLAINTIFF IN ERROR

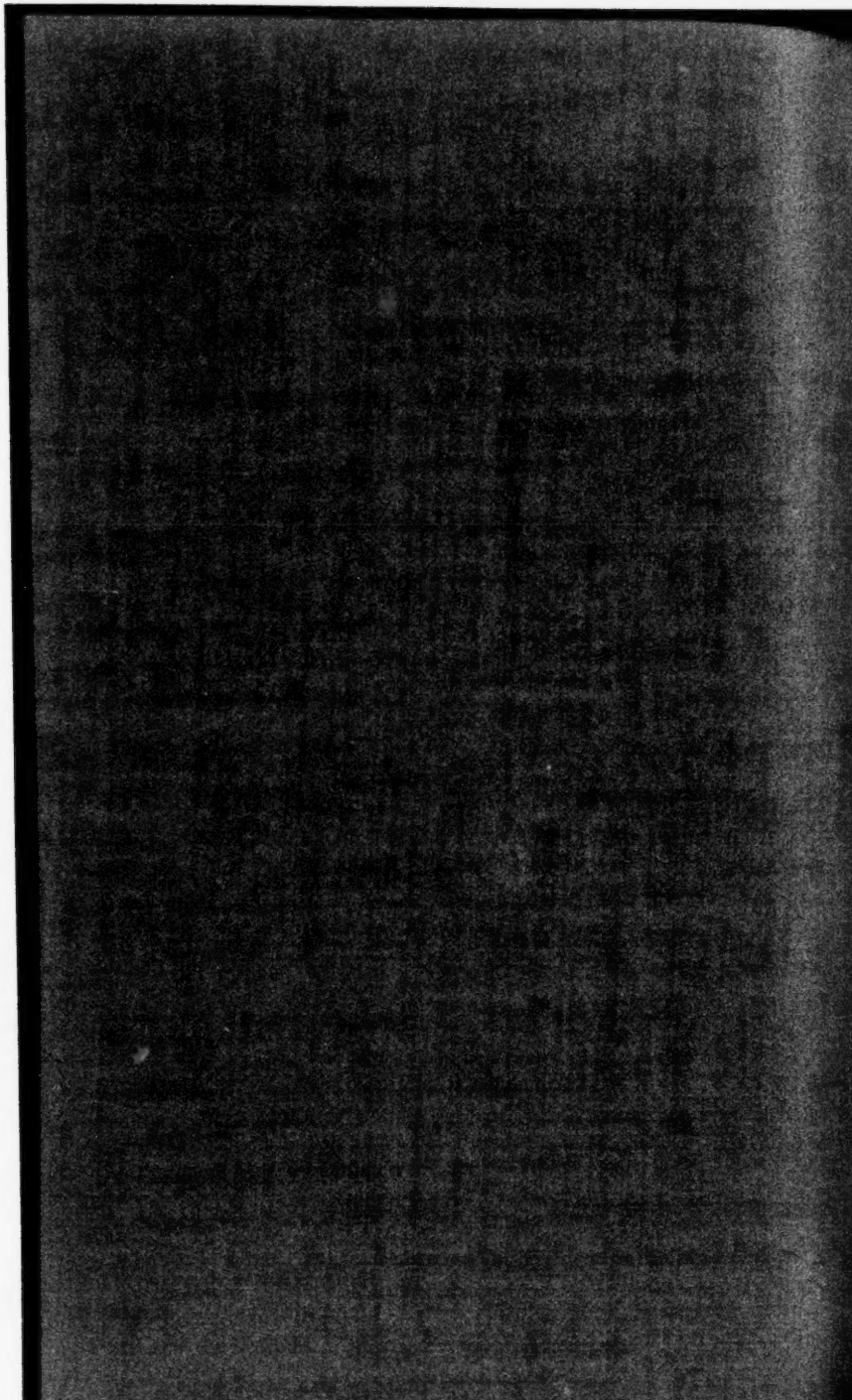
vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

SUPPLEMENTAL BRIEF AND ARGUMENT

For Plaintiff in Error.



Supreme Court of the United States

OCTOBER TERM, 1910.

No. 300.

ALONZO BAILEY, PLAINTIFF IN ERROR

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

SUPPLEMENTAL BRIEF AND ARGUMENT

For Plaintiff in Error.

ASSIGNMENTS OF ERROR.

1. The said Supreme Court of Alabama erred in affirming the judgment of the Court below.

2. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below, and remanding said cause to the City Court of Montgomery for further proceedings.

3. The said Supreme Court of Alabama erred in not reversing the judgment of the Court below and directing the discharge of plaintiff-in-error.

4. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the motions of plaintiff-in-error to quash the indictment against him.

5. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrers of plaintiff-in-error to the indictment against him.

6. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrer of plaintiff-in-error to the indictment against him on ground No. I. (Record, page 5.)

7. The said Supreme Court of Alabama erred in affirming the action of the lower court in overruling the demurrer of plaintiff-in-error to the indictment against him on ground No. II. (Record, page 5.)

8. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (1) and which was excepted to by the plaintiff-in-error.

(Record, pages 12, 28, 38.)

(1.) "Any person who, in Montgomery County, Alabama, and within twelve months before the finding of the indictment, and with intent to injure or defraud his employer, enters into a contract in writing for the perform-

ance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one half of said fine to go to the County one-half to the party injured."

"And the refusal of any such person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or to defraud him."

9. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (2) and which was excepted to by the plaintiff-in-error. (Record pages 13, 28, 38.)

"Any person who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished by a fine in double the damage suffered by the injured party, but not more than three hundred dollars, one half of said fine to go to the County and one-half to the party injured."

10. Said Supreme Court of Alabama erred in affirming the action of the lower court giving to the jury that portion of said general charge which is numbered (3) and which was excepted to by the plaintiff-in-error. (Record, pages 13, 28, 39.)

(3) "And the refusal of any person who enters into such contract to perform such act or service, or refund

such money, or pay for such property, without just cause shall be prima facie evidence of the intent to injure his employer, or to defraud him."

11. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error, called Charge No. 1. (Record, pages 13, 29.)

"Charge No. 1. The Court charges the jury that Section 4730 of the Code of Alabama of 1896 is invalid and void."

12. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 2. (Record, pages 13, 29.)

Charge No. 2. The Court charges the jury that Section 4730 of the Code of 1896, as amended by an Act entitled An Act to amend Section 4730 of the Criminal Code of Alabama of 1896, approved Oct 1, 1903, is invalid and void."

13. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 3. (Record, pages 14, 29.)

"Charge No. 3. The Court charges the jury that Section 4730 of the Code of Alabama of 1896, as amended and of force at the time the offense charged in the indictment is alleged to have been committed, is invalid and void."

14. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 4. (Record, pages 14 30.)

"Charge No. 4. The Court charges the jury that the provision in Section 4730 of the Code of Alabama of 1896, as amended, and of force at the time said offense is alleged to have been committed, that "The refusal of any person who enters into such contract to perform such act or service or to cultivate such lands, or refuses to perform such act or to cultivate such lands or refund such money or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer or landlord or to defraud him, is invalid and void."

15. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 5. (Record, pages 14, 30.)

Charge No. 5. "The Court charges the jury that the provision in said Section 4730 of the Code of Alabama of 1896 as amended and of force at the time the offense charged in the indictment is alleged to have been committed that 'the refusal of any person who enters into such contract to perform such act or service or refund such money or pay for such property without just cause, shall be prima facie evidence of the intent to injure his employer or to defraud him,' is invalid and void."

16. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 6. (Record, pages 14, 30.)

"Charge No. 6. The Court charges the jury that if it believes all the evidence in this case, it must find the defendant not guilty."

17. The said Supreme Court of Alabama erred in affirming the action of the lower court in refusing to give to the jury the charge requested in writing by the plaintiff-in-error called Charge No. 7. (Record, pages 14, 30.)

Charge No. 7. The Court charges the jury that the refusal or failure of the defendant to perform the service alleged in the indictment, or to refund the money obtained from the Riverside Co., under the contract between it and the defendant, without just cause, does not of itself make out a prima facie case of the defendant's intent to injure or defraud said Riverside Company."

ARGUMENT.

After the many decisions of the Supreme Court upon the subject, it is unnecessary to cite the authorities as to due process of law, the equal protection of the laws and involuntary servitude.

The Fourteenth Amendment in forbidding the states to deny—thereby commanding them to afford—"due process" and "equal protection of the laws" in the administration of their government, created no new right in these respects, save to place their enjoyment under the final arbitrament of the Federal authority. What the Fourteenth Amendment commands the state to afford, when it prosecutes a person for violation of its law, is the enjoyment of "its established course of judicial procedure" and the benefit of "the law of the land," as established by the constitution, statutes and decisions of that State.

In Hurtado vs. California, 110 U. S. 516, the court says, "the commands of the Fourteenth Amendment are not too vague and indefinite to operate as a practical restraint," and that it "forbids any course of procedure, unless it hears before it condemns and proceeds upon fixed principles, and not arbitrarily, and renders judgment only after trial."

With these limitations, the State is free from any restraint in the constitution of the United States, to establish and enforce such rules as it thinks proper to constitute "due process." So also, whether it denies "the equal protection of the laws" is to be determined by the natural and ordinary operation of the statutes. The constitution, statutes and decisions of the State are adopted by the Fourteenth Amendment as the standard by which to determine whether under the operation of a particular statute, due process is afforded, or the equal protection of the laws is denied to any person.

The decisions of the State Supreme Court that the act under which Bailey was convicted was not in violation of the State constitution foreclosed further inquiry on that point, and is conclusive on all other courts. The only question the Supreme Court of the United States can consider is whether the statute as administered in this case, violates any right of Bailey under the constitution and laws of the United States.

Viewing this statute in the light of the constitution of the United States, it is apparent that it offends several of its provisions. To constitute the offense the statute denounces, the defendant must entertain the fraudulent intent on three different occasions: First, when he enters into the contract of personal service; Second, when he obtains the money or advances from his employer; and third, when he fails to refund the money. But the fraudulent intent and acts at these different periods, antecedent to the quitting of the contract, does not constitute any offense whatever under this statute. Standing alone, these bad acts, under this statute, are grievances only under the civil law. The situation which brings the defendant under criminal condemnation, and puts life in the statute, which up to that time is inert, is not that the

defendant did these things fraudulently, but that after the doing of them, he failed or refused to perform the contract of personal service, "without just cause." In no jurisprudence that we are aware of, has it ever been held that the abandoning of any contract with just cause, whatever its nature, can subject the party to any liability whatever, either civil or criminal. So that the punishment for which the statute provides is rested on, and can be justified only, because there has been an unjust abandonment of the contract—"without just cause." It cannot be based upon anything else, because none of the antecedent frauds mentioned in the statute, or all of them combined, are criminal offenses. The dominating, controlling and sole fact which puts this statute in motion is the failure without just cause to perform the contract of personal service. The 13th Amendment and the statutes passed in pursuance thereof, secure to every person the absolute right to abandon the performance of a contract for personal service, whether with or without just cause, and to exercise it at his pleasure, and forbids his being subjected to any pains or penalties because he so acts, except the ordinary civil liabilities for the breach of his contract. This is necessarily so, because otherwise the State can by compulsory, criminal, means compel performance of labor or service against the will of the servitor, and thus destroy a right which it is the end and design of the constitution and statutes to protect and safeguard. In its last analysis, therefore, this statute punishes an American citizen because he exercises the fundamental right of quitting, without just cause, the performance of a contract of personal service, the enjoyment of which right is secured to him by the constitution and laws. What stronger assault can be made upon the enjoyment of a right the constitution secures than to punish the person to whom the right is secured because he exercises it? If the State may punish a man for quitting a contract of personal service because he abandons

it without just cause, it may annihilate the 13th Amendment, and re-establish involuntary servitude in the teeth of the Supreme law. The right thus given to quit performance of a contract is absolute and unconditional. It cannot be taken away or undermined directly or indirectly under the guise or the device of regulating the right. Railroad Company v. Morris, 65 Ala. 199; Joseph v. Randolph, 71 Ala. 499. The State has no power to declare that a person shall not exercise this absolute right because prior to its exercise, he may have offended against some law of the State. That would be to outlaw a man, and destroy a right he has under the Federal constitution because he had offended in some other respect against the laws of the State. If the legislature may constitutionally declare that a man shall not exercise a right secured to him by the constitution, because he has fraudulently obtained advances, it may likewise so declare if he commits any other crime, or is guilty even of a civil breach of the rights of another. The legislature has no constitutional power to declare that a certain line of conduct shall, or shall not be an offense, accordingly as the person exercises or refrains from exercising an absolute right which he has under the constitution of the United States. To uphold such a doctrine, we must add a new canon to our jurisprudence,—that a man may be punished criminally because he exercises a constitutional right.

The ordinary, natural and inevitable result of the statute here if allowed effect, being the compulsory performance of labor against the will of the employe, the statute is void, no matter what the language it employs, or however it clouds the issue by cunning words and phrases to disguise the real object and purpose of the framers of the statute.

But this aside, the words and framework of the statute conclusively demonstrate that its purpose is not to punish fraud, or to protect public morals, but merely to com

pel performance of a contract for personal service. The obtaining of money or property by a fraudulent promise to render personal service in the future, not meant to be kept, in whatever form accomplished, can undoubtedly be made a crime by the State, whether or not the thing fraudulently obtained is restored and whether or not the contract under which it was obtained was breached, with or without just cause. The statute purposely and studiously refrains from making the fraud that is mentioned in it the crime which the statute punishes. The fraud is treated only as an incident, and not worthy of the notice of a legislature said to be bent on protecting public morals, but the real grievance is, that there is failure to perform a contract of personal service without just cause. The quitting of the service without just cause is the thing the statute is designed to prevent. The purpose is to compel performance by stress of criminal penalties. The fraud is brought into the statute only incidentally, and solely to cloak the design to punish nonperformance of the contract, and to bolster up the pretense, that under this statute the offender is not punished because he quit the contract without just cause, but for the fraud perpetrated in getting advances before he quit without just cause. The legislature as we have seen has the undoubted power to punish the fraudulent obtaining of advances by criminal enactment, whether the advances are afterwards returned or not, but it cannot use this power so as to hamper and undermine a positive right secured by the constitution. Under the constitution a man cannot be punished criminally, directly or indirectly, or in any manner, shape or form, or by any device, because he exercises his constitutional right to abandon a contract without just cause. Such conduct on his part, cannot be made an element of the fraud. The 13th Amendment excepts from the power of the State in dealing with fraud all authority to make such quitting of a contract for personal service an element of any fraud,

which it may otherwise punish. Having imported into the statute, as one of the elements of fraud for which an offender is to be punished, the ingredient that the offender exercised a right under the constitution, and the provision of the law in this respect being inseparable and designed to promote one end, the compulsory performance of a contract of personal service, the whole act is void.

STATUTES VIOLATES 14TH AMENDMENT.

This statute also violates the 14th Amendment. The State constitution ordains that the right of trial by jury shall remain inviolate. The right to enjoy it as it is afforded to all other persons in like circumstances is a part of the due process the 14th Amendment commands the State to afford, when it prosecutes persons for crime. There can be no difference in the State court in the measure of rights which the defendant shall there enjoy, because he belongs to a particular class, or occupation, or in the nature of the presumption which the law indulges as to his innocence because of the means by which the offense was committed. The enjoyment of the right cannot be burdened in the case of particular persons or particular offenses by exactions or burdens which are not put upon all others. Under the general law of the land the defendant goes before the jury with the presumption of innocence, and that remains with him during the whole trial, until, upon the whole case all the facts establish his guilt as a matter of fact, beyond a reasonable doubt. Ogletree vs. The State, 28 Ala. 693; Coffin vs. the United States, 156 U. S. 432.

Here, the charge is that the advances were obtained by fraud. The party quit the service without just cause, without repaying them. The statute upon these facts raises the presumption as matter of law that the defendant is guilty. It takes away from him the

right to have the jury decide as a matter of fact whether, under all the circumstances, the quitting, etc., proves guilt. It says as a matter of law, if these facts are shown, the law presumes the defendant guilty, unless he proves himself innocent. This burden is placed upon no other person who is indicted for fraud. In all other cases the presumptions of guilt are presumptions of fact which the jury, under the direction of the court, must draw from the circumstances of the whole case. Not only have defendants in this class of cases to meet a presumption of law rigidly fixed in the statute, which is not authorized under the law of the land in similar cases, but the statute arbitrarily, and without any justification in reason or morals, requires the jury, in this class of cases only, to repudiate the great general and essential principle of justice that where an act equally denotes either of two intentions, one of which points to innocence and the other to guilt, the jury must adopt that construction and draw those inferences which lean to innocence rather than those which lean to guilt. Under this statute, if it be conceded to be valid otherwise, the jury, in order to convict, must find, beyond reasonable doubt, that he had the fraudulent intent at three different periods of time; first, when he made the contract; second, when he obtained the advances; third, when he quit without repaying them. If the defendant did not have the fraudulent intent at the time he made the contract, or at the time he obtained the advances, he cannot be guilty under this statute, although he had the fraudulent intent of cheating his employer when he quit the service. How can the *law* say that the mere fact of quitting proves that the fraudulent intent was formed prior to the quitting rather than at the time of quitting? That is not the experience of mankind. Ordinarily men who make contracts and get advances under them do not intend at the time to defraud, but rather expect to repay the advances, and the formation of the

criminal intent generally arises subsequently, in consequence of poverty, disappointment in the results of the contract, or of the pressure of other vicissitudes to which men are subjected in the struggle for subsistence and the pursuit of happiness. There is no presumption that men intend to defraud one another, and there is no presumption of law, where there is an intent to defraud, that it was formed at one time rather than another, when the facts relied on point equally to any period of time anterior to the quitting, as well as to the time of the quitting of the contract. To make a rule and presumption of law, merely because the party quit without just cause, that the fraudulent intent was formed at one time rather than another, is to destroy the right of the defendant to be tried by jury, and his right to have the jury determine the significance of the facts as to the time when the fraudulent intent was formed, as matter of fact, in view of the whole case. This right is given by the law of the land in all other cases.

Chief Justice Brickell, a great jurist, in Gassenheimer vs. The State, 52 Ala. page 319, emphatically condemned as a violation of the legal rights of defendant, any rule which required or authorized the jury to draw inferences of guilt, when the facts admitted of inference in favor of innocence. Speaking of the fact relied on there to justify an inference unfavorable to the defendant, he said (on page 320), "Why that inference? It is the most uncharitable which can be drawn, and must juries, despite the charity of the law which does not permit crime or fraud to be presumed when the facts are consistent with innocence, be invited to indulge such inference? We are of opinion that the evidence was improperly admitted." This statute compels the jury to draw the inference of guilt, merely from the unlawful quitting, that the fraudulent intent existed before the quitting—a fact which must be proved to uphold a conviction under this statute —when the inference may as well, if not better, be in-

dulged from the quitting that the intent was formed then and not at any earlier period. That decision shows, as do numerous others, the established course of judicial procedure. The application of the statutory presumption here, therefore, amounts to a denial of the equal protection of the laws. It not only strikes down the great general and essential principle which inheres in all our jurisprudence, that the defendant shall not be convicted until guilt is proved beyond a reasonable doubt, but puts upon him arbitrarily the burden of overcoming a statutory presumption of guilt, arising from one fact—the quitting of the service—which does not, and cannot, prevail in any other case. See Birmingham Water Works Co. vs. the State, 159 Ala. page 120, wherein the Supreme Court of the State reaffirms Railroad Co. vs. Morris, 65 Ala. 193, and Smith vs. Railroad, 75 Ala. 449, and holds in the case then under consideration that there was arbitrary distinction, which under like circumstances, in principle, it held in the Bailey case was not arbitrary. See Cooley Constitutional Limitations, Sec. 391-3.

These cases, which are in line with like decisions everywhere in the United States, declare that "unequal, partial and discriminatory legislation, which secures rights to some favored class or classes, and denies them to others similarly circumstanced, who are thus excluded from the equal protection of the law, designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of these provisions." The provisions of the Alabama constitution there alluded to are found in the bill of rights.

DUE PROCESS OF LAW.

This statute also amounts to a denial by the State of due process of law, because of the vague and uncertain terms in which the rule of action which the statute intends to enforce is expressed. Section 7 of the consti-

tution of 1901, which the 14th Amendment requires to be observed, when the State prosecutes for violation of its laws, provides that "no person shall be accused or arrested or detained, except in cases ascertained by law and according to the forms it has prescribed, and no person shall be punished but by virtue of law established and promulgated prior to the offense and legally applied."

What constitutes "just cause" for breach of a contract for personal service? The statute does not undertake to furnish any guide. Its language furnishes no clue to the causes which the legislature intended to treat as just or unjust. No person who refuses to perform a contract, no matter how honestly he believes he has cause for quitting it, can tell when the court and jury will convict or acquit him, or what they will deem to be just or unjust cause in any particular case. The statute here is not a law, because the statute itself does not "ascertain" the cause, but it leaves it to the judge and jury to ascertain the cause and declare the law in view of the facts of the particular case. When the judge and jury undertake these functions, they exercise usurped authority, and the legislature illegally delegates to them under this statute power which the constitution of the State says the law making power alone shall exercise. The "law of the land," which the 14th Amendment requires to be applied requires that the rule of action, for non-conformity to which the citizen may be punished criminally, shall be defined with such certainty that a person of ordinary intelligence, on reading the statute, may know what he may do and what he may not do.

But, if this obstacle were out of the way, we are confronted with the further obstacle that the law must be "promulgated" before the offense. There is no promulgation of the law covering the particular offense until the verdict of guilt or innocence. The only way the defendant can know of the promulgation of the law, is after his act is performed, when he is brought in the prisoners'

dock, and the jury promulgate the law by their verdict, based upon such instruction as the judge may give. See Toney vs. The State, 141 Ala. 120, which adopts the conclusion in this respect, in the Peonage Cases, 123 Fed. Rep. 671. The statute might as well have attempted to declare in general terms that, if a man does any wrong to his neighbor about the performance of a contract, or fails to do equity regarding it, he shall be guilty of a criminal offense. The statute prescribes no rule of conduct whatever. No one on reading it can tell what abandonment of the contract the legislature intended to be within, and what without, the influence of the statute. A person punished for violation of such a statute is not punished by due process of law. U. S. vs. Reese, 92 U. S. 214. In the words of Supreme Court of Louisiana in State vs. Castor, 45 La. Annual, S. C. 12 Sou. Rep. 739: "Language of such wide and indefinite import as to leave absolutely uncertain what acts are within, and what acts are without, the statutory provision, cannot operate as a valid criminal statute." See also Bishop on Statutory Crimes, Sec. 41, Ex parte Bell, 22 Tex. Criminal Reports, 31. Carney vs. Andrews, 5 Stockton Chancery Reports, N. J. p. 76.

We are far from contending that the legislature may not lawfully create a criminal offense by using terms which have a well defined and settled meaning at the common law, the known meaning of which, includes all the constituent elements of the offense thus defined. In that case the very words employed inform the defendant of what he is forbidden to do. Hence, the legislature may lawfully provide for the punishment of arson, burglary, larceny, and the like, without defining them more particularly, or prohibit certain games of chance by referring to them only by their popular and well known names, such as the keeping of a gaming table, betting at faro, and the like. In these and like instances, the terms used have a well defined, settled and certain meaning, and ev-

erybody knows when the statute uses them what it means to forbid and what conduct it prescribes. But the phrase "just cause" in this connection has no popular or settled legal meaning, and the very statute shows on its face that the justice of the cause is to be ascertained by the judge and jury in view of the facts of the particular case. They have no constitutional history or meaning as has the term "just compensation" as used in the 5th Amendment; nor have they any well defined, settled meaning at the common law. To uphold this statute is to repudiate Section 7 of the Alabama Bill of Rights.

THE PHILIPPINE CASE.

The defendant in error cannot derive any comfort from the decision in Freeman vs. United States, 217 U. S. 539. The defendant was convicted for embezzling money. No element of performance of a contract was involved. The local statute imposed punishment for violation of the law for a certain term of imprisonment, to uphold the offended dignity of the local sovereign there. It further provided for "subsidiary" punishment according to the value of the property embezzled, etc. The latter it imposed to compel restoration to the wronged party. If the emblezzled money be refunded, the subsidiary punishment may be avoided. If it is not, the offender must submit to the punishment, first, for violating the laws of the island, and, secondly, to further punishment to compel restoration to the wronged individual. Of course an embezzler by undergoing punishment for the crime against the State, is not thereby absolved from civil liability for the conversion. There was no violation of any constitutional right or of the Acts of Congress, which stands in lieu of the constitution in the Phillipine Islands. That case involved no question of due process of law, or the denial of equal protection of the laws, or unjust discrimination in the terms upon which a jury trial can

be had, or arbitrary presumption of guilt. It involves only a question whether or not there was imprisonment for debt.

The argument in support of the statute confounds throughout different things and proceeds on the supposition that, as the legislature can, under certain circumstances, make certain rules for the government of persons in particular occupations and the liabilities that may result therefrom, and sometimes justly discriminate between them by imposing different burdens and liabilities, that this same power of classification obtains as to the rights that these persons may enjoy in the courts of justice. But, such persons are not engaged in their calling or occupation when they seek their rights or defend their liberty in a court of justice. Justice is administered without respect of persons or causes. A man's right in the court cannot be different from the like rights granted other men, either because of the manner in which he obtains advances, or the class to which he belongs, or because he intended to defraud. Justice is not subject to classification, and this statute attempts to make an arbitrary distinction between defendants in these cases and other defendants, as to the extent of the privileges they shall enjoy when proceeded against in the courts of the country for like crime.

What is said in Peonage cases 123 Fed. 671, as to the validity of the original statute, 4730 of the Code, of 1876, before it was amended by the Act of 1885, is pure dictum. It was not enquired about in the questions propounded by the grand jury. The Judge's attention was called to the different acts which he declared unconstitutional. In answering questions put by a grand jury, the judge does not have the benefit of argument of counsel, and it is quite apparent from the reasoning of the court as to the case before it, that had the statute been before him, and the judge's attention been directed to it and to the objections now urged against it, the court would have declared

it unconstitutional. The statute then before that Court, did not contain the arbitrary legal presumption, embodied in the present statute. However this may be, in a case which presents such momentous issues, this court will rely upon its own judgment, not attach influence to a mere dictum of an inferior court in dealing with a different statute.

The fact that Bailey did not offer to testify to his intention does not avoid the effect of the decisions that such evidence cannot be received. It is not deferential to courts and it is specially forbidden by the Alabama and American Bar Association codes of ethics to offer evidence which counsel well knows the highest court has repeatedly decided is illegal. It is true Bailey had the right to testify in his own behalf, and give any *legal* testimony but the statutes of this State prescribe that no presumption shall be drawn against him if he does not testify in his own behalf, and therefore no presumption can be drawn in this case that Bailey had any intention to defraud, be cause he did not essay the vain task of testifying to his mental status or intent.

The strange contention is made, that although the amend ment to the statute making the quitting, etc., prima facie evidence of intent to defraud, be stricken out of the statute, yet a conviction in a court which held that legal presumption warranted and upon which the case was submitted to the jury, should nevertheless be affirmed. If the presumption could not be drawn as a matter of law, and the defendant was convicted by reason of it, the conviction would be illegal, although the remaining parts of the statute were severable from the other feature and capable of carrying out the legislative intent standing alone. See on the general proposition Cooley Con. Lim. Sec. 178 page 196 and note, where he says, speaking of the presumption in favor of an act as a whole and where parts of it have been declared invalid: "In one case the act should be sustained, unless its invalidity is clear; in

the other the whole should fall, unless it is manifest the portion not opposed to the constitution can stand by itself and that in the legislative intent it was not modified or controlled in its construction and effect by the part which was void."

Again he says, in another place: "We do not know that the legislature would have been willing that a part of the act should be sustained if the remainder were void, and there is generally a presumption, more or less strong, to the contrary." Cooley Con. Lim. note page 197.

However, the original statute is void, because, in its last analysis it punishes a man for the exercise of a constitutional right without which the statute can have no effect and was not designed to have any. Therefore, it is of no moment whatever, in this case, whether the presumption provision is separable from the rest of the statute. Taken together or taken separately they are part and parcel of a scheme to work the forfeiture of a citizen's liberty because he exercises an unconditional and arbitrary right, of the propriety of which the constitution and laws of the United States make him the sole judge.

Respectfully submitted,

Fred S Bale

Attorney for Appellant.

[redacted]

OCTOBER TERM, [redacted]

[redacted]

ALONZO BAILEY, PLAINTIFF IN ERROR,

v.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF AND ARGUMENT OF FRED S. BALL,
For Plaintiff in Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 564.

ALONZO BAILEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF AND ARGUMENT OF FRED S. BALL,

For Plaintiff in Error.

STATEMENT OF THE CASE.

The validity of the "Labor Contract Law" of Alabama is the only question here involved.

It is raised by motions to strike, and demurrers to, the indictment and by exceptions to the giving and the refusing of charges to the jury.

Alonzo Bailey was indicted July 25, 1908, in the following language:

"The State of Alabama,
Montgomery County:

City Court of Montgomery, July Term, A. D. 1908.

"The Grand Jury of said County charge, that before the finding of this indictment Alonzo Bailey with intent to injure or defraud his employer, The Riverside Company, a corporation, entered into a written contract to perform labor or services for The Riverside Company, a corporation, and obtained thereby the sum of Fifteen Dollars from the said, The Riverside Company, and afterwards with like intent, and without just cause, failed or refused to perform such labor or services or to refund such money, against the peace and dignity of the State of Alabama."

"S. H. DENT, JR.,
" Solicitor for the County of Montgomery.

(Record, page 1.)

evidence, and has been upheld by this court in the case of State v. Thomas, the soundness of which is not challenged by counsel."

In the case at bar it was again raised and the conclusion reached in the Thomas case affirmed. (Record, pages 18, 19.)

The other constitutional question raised in the Vann case, whether the statute authorized imprisonment for debt contrary to the Alabama Constitution, was disposed of on the first appeal in the simple statement of the Court that the statute is intended to prevent fraud, and not to imprison for debt. It is conceded therein that the offense is dependent upon the failure of the accused to refund the money obtained by entering into the contract, but decided that this is merely beneficial to the accused and not a condition of which he can complain because the State is thus compelled to assume the burden of proving the failure to refund. "He cannot be convicted," says the Court, "without the fraudulent intent, whether he does or does not repay the money. The gist of the crime is to fraudulently get the money, or property of another, and the statute merely condones the offense by permitting the defendant to repay or refund, and requires the State to negative this fact."

On the last appeal herein, this question is disposed of by a recital of the substance of the statute in the Carr case, 106 Ala. 35, coupled with the suggestion that but a casual reading of that opinion would differentiate that case from this, as it was differentiated in Chancey v. State, 130 Ala. 71. (Record, pages 20, 21.)

In the case at bar all of the constitutional questions raised by this record were decided by the trial judge and by the Alabama Supreme Court against plaintiff in error. (Record, pages, 18-22.)

THE REAL EFFECT AND OBJECT OF THE STATUTE.

What is the real object of the statute? It must be either to compel the repayment of the money, or to compel the employe to remain in service, or both. Was it meant either to prevent employes from making fraudulent contracts, or to prevent them from obtaining money by promising service? Surely not. The advancing of the money by the employer to the employe is not to be considered as merely a lending transaction. If so, the security would be a mere promise of one of a class well known to be generally without means to pay, and loans to them without acceptable security are seldom made. ~~The statute is not meant to give a lender security for his~~ If such employes are so notoriously irresponsible and unreliable, employers would not be so anxious to lend them money if there was not some ulterior motive and object. The statute is not meant to give a lender security for his loan. That would be contrary to common sense and business practices. What, then, is the motive of the employer? If he does not advance the money to obtain interest thereon, it must be to secure the services of the employe. He could generally get a contract for the services without the advance money, but then the employe might quit before the end of the term, which is the thing the employer would prevent. He wants the continuous service of the employe for a definite period. To do this he uses a trap, sanctioned by the legislature and not detected by the Alabama Supreme Court, to compel the service.

He advances the money, not as an interest-yielding investment, relying upon the statute to influence repayment, but to bring the employe within the statute which

enables the employer to *compel the service* as the price of freedom from prosecution.

The real object of the statute, we submit, is to enable the employer to keep the employe in involuntary servitude by the overhanging menace of prosecution which he knows must be successful on account of the artificial presumption or rule of evidence making the quitting prima facie evidence of the crime, which is practically conclusive because the defendant cannot testify in his own behalf as to his unexpressed intent.

We do not forget that the Alabama Supreme Court has said that the effect (and, presumably, the object) of the statute is to punish fraud; that a mere breach of a contract is not made a crime. But is also says that "refunding the money * * * is a principal purpose the statute is intended to enforce," and that "when the money is refunded * * * the employer is saved from injury or loss." It also says, "the rendition of service * * * sufficient to have repaid the money advanced to him takes away the essential ingredient of the offense." It also says that "the statute purges the offense if the money is repaid. * * * He cannot be convicted without the fraudulent intent whether he does or does not repay." It also says that "to come within the statute, the sole consideration moving from the employe to the employe must be the performance of personal service." It also says "an essential element of the offense * * * was that the employed person abandoned the service *without first repaying such money.*"

From these excerpts from the opinions in the various cases cited above, can we tell whether the object of the statute is to force the employe to continue in service or compel him to repay the money? If he quits without paying he is condemned! If he serves to the end of the term without paying, he has committed no offense! If he quits without paying but pays before trial (possi-

bly before conviction) the offense is condoned or purged! Ergo, if he so pays, he has committed no offence; otherwise he is pardoned for that offense by the judge or jury upon showing that he committed it and has repaid the money! How would it sound for a thief to plead "not guilty by reason of having been caught and restored the property stolen"?

But, be it remembered, the employe has for the money advanced sold his *freedom for the term*, forfeited his *right to quit* the service, while for the agreed wages he has sold his *services*. He cannot redeem that freedom before the end of the term except by repaying the money advanced—he becomes free by serving the full term even without repayment. He is compelled to pay the money he obtained or to perform service sufficient to cancel the debt. See McIntosh case, 117 Ala. 128, at page 130, holding that the employer could retain the wages to satisfy the debt. (Doubtless the contract in the case at bar was drawn to meet that ruling—the money advanced herein being made payable (by indirection) $1.25 per month. But Bailey had not, when he quit, earned as much as the loan to him: if he had, it does not appear that the wages had not been paid to him less the $1.25 then due on the loan).

If the real object is to prevent such frauds, why was the statute originally aimed at employes, and no one else? Are they an infamous class? Are they less honest than other men—employers, forsooth? And then, why did the amendment extend to no one but tenants of farms? Are they less willing to pay their rent than the occupiers of dwellings or store houses? Why does it not include that innumerable horde who infest store-houses daily and buy goods for which they do not intend to pay? Does not their failure or refusal to pay at the promised time prove their intent to defraud as much as does the act of the employe or tenant which is made *prima facie* evidence of his guilt?

OR COPY

It is all too plain. The purchaser of goods promises *no services*—the employe and the farm tenant promise substantially *nothing but service.* The merchant wants pay for his merchandise, but not service: the employer (hence his designation) *wants the service*, and not the money advanced: it is for the service he pays the *wages,* but for the *right* to that service for a definite term that he makes the *advance.*

Then, what is the real object and effect of the statute? Is it to compel *payment* or to enforce *service?* If *either,* is it valid?

The genuine object and purpose of these statutes may be found in the language of Judge Brawley in United States v. Clement, 171 Fed. 974: "There is a public sentiment in some parts of the South which finds expression in labor contract laws, that there is special need of legislation to compel the negroes to the performance of their contracts by imposing penalties for their violation."

WHY THE AMENDMENT AS TO PRIMA FACIE EVIDENCE.

As considered in the Riley case, the statute provided punishment for obtaining money or other personal property by a promise not meant to be kept. To convict it was necessary to prove a mental status, the existence of the intent not to fulfill the contract. This is a question of fact for determination by the jury.

POOR

PROOF OF MENTAL STATUS.

"In this state, although differing from the rule declared in some other states, we refuse to allow parties, when testifying in their own causes, to give evidence of their own uncommunicated motives or intentions. * * * The result is, that, with us, motive and intent remain as they were at common law—inferences to be drawn from surrounding facts and circumstances."

Ala. Fer. Co. v. Reynolds & Lee, 79 Ala. 500;
Burke v. The State, 71 Ala. 377;
Whizenant v. The State, 71 Ala. 383;
Brown v. The State, 79 Ala. 51;
Ex parte Riley, 94 Ala. 83.

While the statute is akin to those against obtaining goods by false pretenses, it is radically different in the difficulty of proof. In the former, proof of the existence *vel non* of the pretense is not inherently difficult—in the latter, proof of the intent of the employe is practically impossible. Before the amendment, shielded by the presumption of innocence, not compelled to incriminate himself, nor permitted to testify to his uncommunicated intent, the accused was in little danger of conviction, whether guilty or not. This is shown by the results of the cases appealed to the Alabama Supreme Court from convictions under the statute before amendment.

The amendment as to *prima facie* evidence was unquestionably meant to change this condition of things. We need no better statement of this than the words of Mr. Justice Denson in the case at bar on first appeal: "It is no doubt true that the difficulty in proving the intent, made patent by that decision (Riley case) suggested the amendment of 1903 to the statute, which provides that the refusal or failure of a person who enters

COPY

into such contract, to perform such act or service * * * shall be *prima facie* evidence of the intent to injure or defraud his employer." Bailey v. State, 158 Ala. 25.

By indirection and evasion, under authority of the inaccurate and inapplicable statement that "the legislature may declare what shall be *prima facie* evidence" —facts which constitute the mere breach of a civil contract *which the Alabama Supreme Court says is not a crime*, are made *prima facie evidence of a criminal offense.*

If the object was not to draw by statute a conclusion different from that the jury would otherwise draw, what possible object could the Legislature have? If the effect is not to force such conclusion, it has no effect.

Are not the right of trial by jury, the presumption of innocence, the equal protection of the laws, the essentials of due process of law, and the prohibitions against imprisonment for debt and against involuntary servitude except for crime, brushed aside by the omnipotent devices of a State Legislature!

Two questions arise: (1) Is the legislature authorized to make rules of evidence violative of constitutional rights, and (2) is this a mere rule of evidence?

THE STATUTE DENIES DUE PROCESS OF LAW.

The Federal Constitution provides that no State shall "deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Alabama Constitution provides that the right of trial by jury shall remain inviolate.

The denial of any one of the essential elements of a jury trial is a denial of the *right* of jury trial. The uni-

versal presumption of the innocence of the accused is an element of jury trial and casts upon the State the burden of proving guilt beyond a reasonable doubt. Any legislation infringing, or authorizing the court to infringe, upon the function of the jury is a violation of the right of trial by jury. 24 Cyc. 191, G. If the real effect of a statute in Alabama is to deprive the accused of any essential element of a jury trial, it is in violation of the Federal Constitution.

This statute denies to plaintiff-in-error his right to trial by jury because it arbitrarily overcomes the presumption of his innocence and gives him no fair opportunity to rebut the prima facie evidence of his guilt.

> Wildering v. Corbin Banking Co., 126 Ala. 279.
> Wilbern v. McColley, 63 Ala. 436.

The Thomas cause, *supra*, upholds the provision as to *prima facie* evidence on the authority of the text in 8 Cyc. 820, as follows: "The legislature has power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings, it may declare what shall be *prima facie* evidence." Like all statements of general rules, this is subject to limitations and restrictions. So, in 8 Cyc. 1090, treating of "Due Process of Law," under the specific head of "Deprivation of Life and Liberty," the rule is more accurately stated—"A state may establish and alter rules of evidence as to what constitutes proof of an offense, *provided the accused is given a fair opportunity to explain and contest the charge, and the rule is not arbitrary in character.*"

> Commonwealth v. Wallace, 7 Gray, 222.
> Adams v. New York, 192 U. S. 585.

Again the rule is stated in 24 Cyc. 192, "the legislature may provide that proof of certain facts shall be sufficient to establish a *prima facie* case in either criminal or civil cases, *for a prima facie case* does not overcome the presumption of innocence or change the burden of proof, or require the jury to convict unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt. *This rule, however, is subject to the limitation that the fact relied on as establishing the prima facie case must have some fair relation to or connection with the main fact and that the accused must have an opportunity to make his defense and submit the whole case to the jury; and it is not competent for the legislature to create presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime of which the defendant is accused.*"

How inadequate, then, is the announcement of the Alabama Supreme Court that the "amendment is a mere rule of evidence," especially when it is admitted in the same opinion that the legislature "cannot prescribe what shall be conclusive evidence, as this would be an invasion of the province of the judiciary."

Doubtless the State will urge in support of the statute the Fong case, 149 U. S. 729, holding that the provision (of the Act of Congress) which puts the burden of proof upon him (the Chinaman), of rebutting the presumption arising from his having no certificate, as well as the requirement of proof by at least one credible white witness that he was a resident of the United States at the time of the passage of this Act "is *within* the acknowledged power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence, in the courts of its own government." But it is pointed out in that case that that proceeding was in no sense a trial and sentence for a crime

POOR

but the enforcement of a valid regulation of the entrance of aliens into this country, and that *Fong was not therefore, deprived of life, liberty or property without due process of law.* Fong was an alien. He was seeking to claim the benefits of a privilege, not a right. These requirements were reasonable and not arbitrary. There was no mental status involved. It was always possible for the alien to meet the requirements and if entitled to remain in this country, he had all due opportunity to overcome the *prima facie* or presumptive evidence. Being a Chinaman, the presumption would be that he was not entitled to remain, and yet he is afforded the means of overcoming the presumption against him. We think the case has no application here, and the statement of the "acknowledged power of every legislature to prescribe rules of evidence" was not meant to be an accurate or final declaration of a rule in criminal cases. Three members of this Honorable Court dissented on this very point.

But we say the statute is invalid because:

(1) Though *nominally* it declares a *prima facie* rule, it *really* fixes a *conclusive* rule, and

(2) If it is only a *prima facie* rule, it is bad because it is arbitrary. The facts made *prima facie* evidence of the intent with which the contract was made has no relation to that intent, these facts are perfectly consistent with his innocence, and the defendant it not afforded a fair opportunity to submit his whole case to the jury.

Let us test the statute by these principles and illustrate it by the case at bar.

By agreeing to work twelve months, Bailey obtained $15, to be repaid by the withholding of $1.25 from his wages each month. If he then and there intended to defraud the Company he violated the statute. That intent was a mental status, which no one could know except himself. Testimony that he had stated at any

COPY

time that he *did not* intend to perform the service would support a conviction. But testimony that he stated at any time that he *did* intend to perform the service would be incompetent. He is presumed, in the beginning to be innocent. But after a month and four days work, for reasons not disclosed by the record, but admitted to be without just cause, and without refunding the money he had obtained, he ceased to work. Instantly, in spite of the continuing presumption of innocence, there is *created* by this legislative rule, *prima facie* evidence that he intended to defraud his employer, not only when he ceased to work, but when he made the contract and obtained the money. By an act which occurred more than a month afterward, the original transaction, then apparently, and, perhaps actually, legal and moral, is converted into an illegal, immoral and criminal act. The intent with which the original transaction was made is thus ascertained or determined by an act occurring a month later, an act not in itself criminal, and having no logical connection with that intent. Without the statute there is no evidence even tending to show fraud; with the statute the evidence is conclusive of fraud, because defendant's lips are sealed by the law of Alabama and there is no way to overcome the *prima facie* evidence.

If he had worked six months the effect would have been the same. How an act not related by cause and effect or in any other logical manner, can be made *prima facie* evidence of the character of an intent existing six months before, (the defendant having no opportunity to declare his intent) without violating the right of trial by jury is beyond our comprehension. The Riley and McIntosh cases show that the Alabama Supreme Court considered such evidence would not support a conviction, when unaided by the *prima facie* evidence created by the statute.

POOR

For the manifest purpose of making convictions possible, easy, even certain, the legislature arbitrarily undertook to give the facts a weight they did not naturally, inherently or judicially possess. It made them conclusive for all practical purposes.

In Alabama it is said "If any question of fact or liability be conclusively presumed against him, this is not due process of law."

Zeigler v. S. & N. A. R. R. Co., 58 Ala. 599.

It must have intended to make them conclusive, for it would have been a vain thing to make them merely *prima facie*, unless this would secure convictions. If the *prima facie* evidence would not overcome the presumption of innocence, it would not relieve the condition, but if it did, and the defendant could not rebut that evidence (as he cannot in Alabama because he cannot testify to his intent) the result would be inevitable —the defendant would be convicted.

This defendant was convicted because the *prima facie* evidence was held to overcome the presumption of innocence.

Mr. Justice White, in Coffin v. United States, 156 U. S. 453, says: "The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law. * * *The presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

But this statute singles out a fact not of itself tending to show fraud and makes it the instrument to overcome this fundamental presumption which is itself proof of

innocence until the jury is satisfied beyond reasonable doubt of his guilt. Tested by the rule laid down in the Riley case, there was no evidence of Bailey's intent to defraud except the *prima facie* evidence created by this statute. If that was not sufficient to support a conviction, charge 6 (Record, p. 41) should have been given and the defendant discharged. The Alabama Supreme Court has impliedly held in this case, that a conviction is supported by the *prima facie* evidence, without more.

In the case at bar as well as in the Thomas and Vann cases, the *prima facie* evidence was treated as overcoming the presumption of innocence and supporting conviction.

In Kelly v. Jackson, 6 Peters 622, 8 L. Ed. 523, it is said that *prima facie* evidence "is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose. * * * In a legal sense, then, such *prima facie* evidence in the absence of all controlling evidence, or discrediting circumstances, becomes *conclusive of the fact.*"

Statutes have been held valid which make the possession of stolen goods, burglars' tools, gambling paraphernalia, policy slips and intoxicating liquors in certain cases, *prima facie* evidence of crime, because there is a logical connection between these things and the offense, and evidence is possible and admissible to rebut the *prima facie* case. Adam's case, 192 U. S. 585. A mental status is not the issue, and the defendant may explain his possession of the articles, by his own testimony, though he may not declare his specific intent in reference thereto.

If the failure or refusal to perform a contract or to refund money obtained thereunder is no crime, how can it be made such evidence of crime as to support a conviction? There is no general or natural presump-

POOR CO

tion arising out of a subsequent breach of contract, that the intent to breach existed when the contract was made long before.

It may be that the statute would declare a valid rule if limited to cases where the defendant made a contract for *immediate* service and immediately refused to enter upon it, for *that* refusal might support an inference as to the specific intent, the time of making the contract and the time of refusal being practically the same, showing conclusively that the intent to defraud existed when the contract was made.

It was held in Commonwealth v. Rubin, 165 Mass. 453 that where the intent is material to conviction of larceny, if the conversion followed hard upon the receipt of the property, it is not unnatural that the felonious intent existed from the beginning;—a question left to the jury. But to make that case of weight for defendant in error, it must have shown that the failure to surrender the property was *made prima facie* evidence that such intent existed at the time of the receipt of the property.

We cannot see how Morgan v. State, 117 Ind. 569, can have any weight, as it is not analogous and the points here involved were not there considered.

If there are no limitations on the power of the legislatures to fix rules of evidence, they may emasculate all constitutional rights. For what more arbitrary rule of evidence could be made than that involved here?

But it may be said that the Alabama Supreme Court has held that the statute does secure the right of trial by jury, and this Court is bound by its decision. See Jackson v. Lamphire, 3 Peters, 280, quoted on page 17 hereof.

But, be it so:—then, what shall be said when it appears that no other class of offenders in Alabama is deprived of the benefit of the presumption of innocence,

equivalent to one witness in behalf of the defendant, by an artificial rule of evidence, by which an inconsequential act is arbitrarily made to prove (in effect) his guilt? Then all we have said under this head finds a fitting place under the discussion of "equal protection of the laws."

B. & P. S. Co. v. Randolph, 119 Ala. 510-11.
Yick Wo v. Hopkins, 118 U. S. 356, 374.

THE STATUTE UNCERTAIN.

Three times in the statute appear the words "and without just cause." What do they mean? To what word are they grammatically related? Does the phrase refer to the repayment, refunding or restoration of property, or to the refusal or failure to perform the stipulated service? No just causes for non-payment occur to us except payment or satisfaction by counter-claim, equivalent to payment. It can hardly mean that. Does it refer to the refusal or failure to perform the service? The only just causes for refusing to perform the service are those things done by one of the parties recognized by the law of contracts as authorizing a termination by the other. If these are meant, the statute may be sufficiently certain in its terms to be valid.

But if the phrase is meant to leave it to the court or to the jury to decide what facts or circumstances are just cause for the refusal or failure of the accused to repay the money or to perform the service, the statute is void for violating a cardinal requirement of criminal statutes—that of certainty.

The legislature may not delegate to judge or jury the power to supply an essential element to the statute where it has fixed no rule or guide therefor.

POOR

In the case at bar Mr. Justice Denson said it was a question for the court and jury (Record, p. 19). The statute does not say so. In Toney v. State, 141 Ala. 120, it is said to be for the judge or court as the statute prescribed. In the McIntosh Case (117 Ala. 128) it seems that payment before conviction is equal to "just cause." In Toney v. State, 141 Ala. 120, where "without sufficient excuse" is used in a statute as "without just cause" is used in this, Mr. Justice Sharp said "The existence of an excuse for the abandonment to be judged of by the court could never be known to be available except at the risk of, and at the end of, a criminal prosecution."

"A statute (creating an offense not existing at common law) must be sufficiently certain to show what the legislature intended to prohibit and punish, otherwise it will be void for uncertainty."—12 Cyc. 142.

United States v. Reese, 92 U. S. 214.

If the statute is not void for uncertainty, these words "without just cause" still work its destruction for reasons which are discussed herein under the head of "Involuntary Servitude." If it is void, conviction there under must be without due process of law, and the statute subject to the consideration of this Court.

THE ORIGINAL STATUTE VOID.

Independent of the vices of the amendment, we submit that the original statute is invalid. In its last analysis it declares that it is a crime for one to make a contract which he intends not to perform. It differs very radically from the "false pretense" statutes, in which not only the intent to injure or defraud must ex-

COPY

ist, but some false representation, misleading the injured party, must be made. Mr. Justice Stone made this emphatic statement in Colly v. State, 55 Ala. 85; speaking of an indictment "It charges no more than the making of a promise, to be performed in the future, which the defendant failed to observe and keep. * * * A false pretense is a false representation * * * relating to some existing or past fact; and, to be indictable * * * it must actually mislead. * * * A promise, not meant to be kept, is not a false pretense. Bishop Stat. Crimes, § 451.

But here the mere unexpressed intent not to perform a contract, without any false representation, is made the essence of the crime. Reprehensible as such dishonesty may be, it cannot, under our constitutional limitations be punished as crime.

If the statute had contained the words "by any false pretense or token" it would have been good, and it would have meant nothing more or less than the "false pretense" statute (Code of Alabama, 1907, § 6920 quoted above), which did not accomplish the object desired. But if it had so read and, in this case, Bailey had simply made the contract, obtained the money thereby and made no sort of representation, what false pretense could exist misleading to the employer? If he had falsely said that he had means or that he was a skilled employe, the false pretense would have existed. But, it would seem that the only thing about which the employer could be misled under this statute is the *existence of the intent not to perform the contract.* If when he contracted, Bailey had in his mind the fixed intent not to perform the contract, and yet gave no expression as to whether that intent existed or not, there was no false pretense and no criminal fraud. If such intent not to perform did so exist, and he had said to his employer that it did not exist, and the employer had

thus been misled, Bailey would have made a false pretense.

If this statute is valid, then others will be, such as: "Any person, who, with intent to injure or defraud his banker, gives him a promissory note, and thereby obtains money, and with like intent and without just cause and without refunding the money borrowed, fails or refuses to pay such promissory note, must on conviction be punished, etc.," and to complete the illustration, "and the failure or refusal to pay said note or to refund said money, without just cause, shall be *prima facie* evidence of the intent to injure or defraud."

Carried to its ultimate length, the statute means that *one may be criminally punished for making any contract which he secretly intends not to perform.*

In Peonage Cases 123 Fed. 671, 690, Judge Jones of the Middle District of Alabama, in his instructions to the grand jury says that the original act is constitutional, but it is evident that the statement was made only for that occasion and indulging all presumptions in favor of the statute so far as the grand jury was concerned.

EQUAL PROTECTION OF THE LAWS.

Does the statute not deny to plaintiff in error the equal protection of the laws? The contract between him and the Riverside Company imposes on the employe the obligation to work for the employer and to repay the money advanced to him, and on the employer the obligation to pay the employe his wages each month. Where farm tenants are concerned, the landlord frequently obligates himself also to furnish "rations," fertilizers, live stock, peaceable possession and other things. For breaches of those obligations the law affords ample rem-

edy to each. By appropriate actions the employe may collect his wages, and the employer his advances and damages for the failure of the employe to perform the services. The legislature of Alabama was evidently not content with this equality before the law.

But in such cases there can be no decree for specific performance and no civil action to compel the actual personal services of the employe.

Does not the statute give to the employer an advantage which is denied the employe? While it does not expressly authorize punishment of the employe for not performing the service, it does provide that he may be punished if he made the contract and obtained the advance money with intent not to perform the service. There is no corresponding provision for punishing the employer if he entered into the contract and thereby secured the services of the employe with intent not to pay therefor. This might be a theoretical matter under the statute as it stood before amendment, for conviction was then well-nigh impossible. But aided by the amendment prescribing the *prima facie* evidence, it gives the employer an unconscionable advantage. It enables him to resort to, or hold over the employe the menace of, a criminal prosecution (which both know must be successful), thus coercing the employe to perform the service or to refund the money advanced. It does not give the employe a corresponding remedy to compel the employer to pay the wages. As to the farm tenant and landlord, in the same way it enables the landlord to force the tenant to cultivate the land and perform the service contracted for, without giving the tenant an equal remedy to compel the landlord to comply with his lease contract which may contain many stipulations—such as furnishing rations, seed, fertilizers, live stock, peaceable possession to the end of the term, etc.

These burdens are placed upon and limited to classes contracting to perform service. In Harris case, 47 So. Rep. 340, the Alabama Supreme Court expressly states that "this is a criminal statute, *aimed solely at those who enter into contracts to perform personal service.*" If equal and exact justice—"the equal protection of the laws"—was the aim of the legislature, why did it not lay the corresponding burdens on the employer and the landlord? Where is the equal protection of the laws in this condition of things?

Why, too, are employes singled out from all the numerous persons who borrow money and made subject to such penalties?

In the Peonage Cases, 123 Fed. 671, is a very able and exhaustive treatment of this subject, by Judge Thomas G. Jones, District Judge for the Middle District of Alabama. Any attempt on our part to discuss it would be only a mutilation of most persuasive language. We should say, however, that, in charging the grand jury he evidently assumed the validity of the original statute involved in this Case because the statute was not before him for construction.

The Alabama Labor Contract Statute of Mar. 1, 1901, (Acts 1900-1, p. 1208) was held to be unconstitutional as violative of the right to equal protection of the laws, in an able opinion by Mr. Justice Sharp, (Toney v. The State, 141 Ala. 120). He cites and quotes from some of the leading decisions of this court. Therein he thus refers to the words "without sufficient excuse" as used in that statute as the words "without just cause" are used in that under consideration herein, "the existence of an excuse for the abandonment to be judged of by the court could never be known to be available except at the risk of, and at the end of, a criminal prosecution."

Joseph v. Randolph, 71 Ala. 499.

INVOLUNTARY SERVITUDE.

The statute plainly and flagrantly violates the Thirteenth Amendment to the Federal Constitution.

We stop to quote two expressions used by the Alabama Supreme Court in considering this statute. In the McIntosh case, 117 Ala. 128, Mr. Chief Justice Brickell said, "*Refunding the money* * * * is a principal purpose the statute is intended to enforce." In the Vann case, 43 So. Rep. 357, Mr. Justice Anderson said, "The gist of the crime is to fraudulently get the money or property of another, and the statute merely *condones the offense of permitting the defendant to repay or refund.*"

The penalty is a fine in double the amount of damage suffered by the injured party, not to exceed $300. If the limit may be placed at $300, why can it not, in principle, be placed at $3,000, or any other sum, not unreasonable?

The Alabama Supreme Court has condemned a statute prescribing a punishment of this kind, in the case of Carr v. The State, 106 Ala. 35, holding that it authorized imprisonment for debt. While we cannot object to the statute under consideration on that specific ground, in terms, yet if it sanctions imprisonment for debt it authorizes a form of involuntary servitude and is obnoxious to the Federal Constitution.

Mr. Justice McClellan said in that case: "This statute cannot be read without conviction that its purpose is to impose imprisonment for debt, and to coerce the payment of a debt by the duress it authorizes. Its requirement that the fine shall be paid only in money, that it shall be double the amount of the deposit, and that one-half of it, that is, a sum equal to the amount deposited, shall go to the person who made the deposit, tends at least, to show that coercion of payment

of the debt which the depositary owed the depositor—for the transaction created the relation of debtor and creditor between them—by means of the restraint which the imposition of the fine itself immediately put upon the defendant—not to speak here of his imprisonment preliminary to the trial—and, that failing to enforce payment, by means of imprisonment at hard labor for the payment of the fine and costs, was the moving purpose and efficient cause of the enactment of the statute. And what doubts on this point might have been left, had the statute stopped here, are removed beyond peradventure by its further provision that payment to the depositor at any time before conviction, "shall be a good and lawful defense to any prosecution under this act." There cannot be two opinions as to the intent and meaning, or the effect upon the whole enactment, of this last and most remarkable provision. It is a declaration of the baldest and most direct character to one party to a transaction whereby he has incurred a debt to the other, in the name of the State, that unless he pays that debt, he shall be arrested, held to trial, tried, convicted, fined and imprisoned at hard labor, and this obviously not for any taint of criminality in the transaction out of which the debt arose, but purely and simply for the non-payment of the debt. For this default, and until it is purged either by simply paying the debt and accrued costs before conviction or by working out double the debt and the costs, the debtor may be imprisoned for an indefinite time before trial, merely and only because he does not pay the debt and the expenses of putting this coercion upon him, there being no pretense even of ultimately punishing him for taking the deposit, if the preliminary imprisonment shall have the desired effect of extorting the money he owes the depositor out of him, and if, as is the case here, the compulsion of preliminary imprisonment fails

of its intended effect, he may, under the guise of punishing an act which was not criminal before this statute, and which upon the statutory definition does not necessarily involve abstract criminality or the taint of moral turpitude, and which might up to the very moment of conviction have been shorn of even its factitious criminality by the payment of the debt, be held to hard labor until his services at the statutory rate shall yield the amount of the debt, and for an equally long time to work out a like sum imposed upon him as an additional penalty for his failure to pay the debt before conviction. There can, in our opinion, be no sort of doubt that this enactment is violative of the constitutional provision, and therefore void."

There can be no imprisonment for debt in Alabama, even though it originated in fraud. In this respect its Constitution differs from many others.

Ex parte Hardy, 68 Ala. 303.

While the contract involved in the case at bar may not be void for uncertainty, if the statute enables the employer to enforce involuntary servitude by the employe, the statute is invalid and there can be no conviction under it.

"Involuntary servitude" includes all forms of compulsory service for the benefit or pleasure of others.

Slaughter House Cases, 16 Wall. 36.
Civil Rights Case, 109 U. S. 3.
Clyatt v. United States, 197 U. S. 207.
Robertson v. Baldwin, 165 U. S. 275.

By this statute the employe is made to perform compulsory or involuntary service from the moment he desires to quit the service and is deterred therefrom by the menaces of the statute. What are the menaces of

the statute? The first is the certainty of conviction because of the rule making the quitting *prima facie* evidence of crime. The second is the prospect of imprisonment before trial even if he have a "just cause." for quitting the service, because the "just cause" of the statute is a vague and indefinite thing and he must take the risk of a correct prediction as to whether what he thinks a just cause will be held to be so by the judge and jury. For fear of making a mistake as to his "just cause" for quitting, he remains in the service under duress. The statute does not define the "just cause" and no one can foretell what conclusion may be reached by different judges or juries from the same state of facts. Mr. Justice Sharp, in Toney v. The State, 141 Ala. 125, says "the existence of an excuse for the abandonment to be judged of by the court could never be known to be available, except at the risk of, and at the end of, a criminal prosecution."

> Central, &c., Ry. Co. v. R. R. Com. 161 Fed. 925. See Ex parte Young, 209, U. S, 123,

Every man has the legal right to quit a personal service contract if he is willing to pay the civil penalties. Criminal penalties may not be lawfully added to secure the service, for, as stated by Judge Cooley in his work on Torts, "It is the part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice."

In Ex parte Drayton, 153 Fed. 986, is an able opinion by Judge Brawley to which we ask careful consideration. The Alabama statute is quoted on page 993 of the opinion as it stood when the Riley case was decided, and before any of the amendments discussed herein were added to the statute.

State v. Murray, 116 La. 655 although upholding a similar statute, contains the significant statement of the Chief Justice that if it were "an attempt on the part of the employer because of his laborer's indebtedness to compel him to continue to perform his daily task the result would in all probability be different."

On cases of involuntary servitude, see, also,

In re Thompson, 1.7 Mo. 83;
In re Turner, 24 Fed. No. 14247; 1 Abb. 84;
In re Clark, 1 Blackf. (Ind.) 122.
Webb v. Webb, 140 Ala. 268.
Murray v. Murray, 84 Ala. 365.
United States v. Clement, 171 Fed. 974.

In South Carolina, war has been waged over these labor statutes. At first they were upheld, but both State and Federal courts have finally in masterful opinoins, annulled them.

Ex parte Hollman and collated authorites and note, 21 L. R. A. (N. S.) 242.
Ex parte Clement, 171 Fed. 974.

Freeman v. United States, No. 14 U. S. S. Ct. Advance Sheets, p. 592, may be used as authority by defendant in error, but we think it hardly necessary to say more than that that case originated in the Philippine Islands, and that the original taking of the money in that case was felonious, while in this the defendant obtained the money by contract and without a taint of criminality.

CONCLUDING CONSIDERATIONS.

In addition to the statute under consideration, and in spite of the declared invalidity of the Act of 1901 referred to above in Toney v. The State, 141 Ala. 120, the present Code of Alabama contains the following statutes:—

"And person who knowingly interferes with, hires, employs, entices away, or induces to leave the service of another, or attempts to hire, employ, entice away, or induce to leave the service of another, any laborer or servant, renter, or share-cropper, who has contracted in writing to serve such other person for any given time, not to exceed one year, before the expiration of the time so contracted for, or who knowingly interferes with, hires, entices away, or induces any minor to leave the service of any person to whom such service is lawfully due, without the consent of the party employing, or to whom such service is due, given in writing, or in presence of some credible person must, on conviction, be fined not less than fifty nor more than five hundred dollars, at the discretion of the jury, *and in no case less than double the damages sustained by the party whom such laborer or servant was induced to leave; one-half to the party sustaining such damage,* and the other half to the county."

"When any laborer or servant, renter, or share-cropper, having contracted as provided in the preceding section, is afterwards found in the service or employment of another before the termination of such contract, that fact is prima facie evidence that such person is guilty of a violation of that section, if he fail and refuse to forthwith discharge such laborer or servant, after having been notified and informed of such former contract or employment."

"Any person who employs any immigrant, or otherwise entices him from his employer, in violation of the contract of such immigrant, must, on conviction, *be fined in a sum not less than the amount of wages for the unexpired term of the contract*, and may be imprisoned in the county jail, or sentenced to hard labor for the county, at the discretion of the jury, for not more than three months."

Code of Alabama, 6850, 6851, 6854.

The Court takes judicial knowledge of the official report of the United States census. That shows a population in Alabama in 1900 of 1,828, 697 of whom 827,307 were colored. 1,304,703 were over ten years old. Of these over 500,000 were engaged in agricultural service, out of a total of about 750,000 in all gainful occupations.

All of these statutes may well be viewed as a system meant to give to a dominant class undue and unequal powers over a great army of less fortunate citizens who eat their daily bread in the sweat of their face, and who by reason of their weak and defenseless condition should rather be the especial objects of the law's protection. Negro slavery has passed away, but if a system of peonage of white and black shall arise in its stead, the last estate shall be worse than the first, for the only limitation upon the masters will be their want of wealth and power, both of which will be augmented by the system they support.

In Clarke's case, 1 Blackford 122, 12 Amer. Dec. 213, we read:—

"Deplorable indeed, would be the state of society, if the obligee in every contract had a right to seize the person of the obligor, and force him to comply with his undertaking. In contracts for personal service the exer-

cise of such a right would be most alarming in its consequences. If a man contracting to labor for another *a day, a month, a year, or a series of years*, were liable to be taken by his adversary and compelled to perform the labor, it would either put a stop to all such contracts, or produce in their performance a state of domination in the one party,and abject humiliation in the other. We may, therefore, unhesitatingly conclude that when the law will not directly coerce a specific performance, it will not leave a party to exercise the law of the strong and coerce it in his own behalf. A state of servitude thus produced, either by direct or permissive coercion, would not be considered voluntary in fact or in law."

In the words of an apt quotation used by Judge Cooley:—"Not only he who *feels*, but he who is *exposed to*, tyranny, is without freedom."

To the commercial argument so often offered in favor of this class of statutes that they are necessary to enable the planter to make his crop, which is vital to the welfare of the South, Mr. Justice Jones of the South Carolina Supreme Court gives a complete answer in the few words, "Liberty is better than prosperity." Ex parte Hollman, 79 S. C. 9.

The age of these statutes is no reason, of course, for their continuance, if invalid. It will be remembered that Chief Justice Holt was the first to lay down a doctrine that required fifty years to fully establish in England in the case of Somersett by Lord Mansfield. Holt, C. J., had said: "Trover does not lie for a black more than for a white man. By the common law no man can have a property in another man, except in special cases, as a *villein*, or a captive taken in war, but in England there is no such thing as a slave, and a human being never was considered a chattel to be sold for a price, and, when wrongfully seized, to have a value put upon him in *damages by a jury* like an ox or an ass."

3 Keble, 685;
1 Lord Raym. 146;
2 Lord Raym. 1275;
Salk, 666.

When Somersett, the slave from Jamaica confined on board ship in the river Thames, made his claim for freedom by *habeas corpus* to Lord Mansfield, the Chief Justice said: "I care not for the supposed *dicta* of Judges, however eminent, if they be contrary to all principle (he was referring to the opinions of Lord Talbot and Lord Hardwick cited by counsel). At any rate villeinage has ceased in England and it cannot be revived. The air of England has long been too pure for a slave, and every man is free who breathes it. Every man who comes into England is entitled to the protection of have suffered, and whatever may be the color of his skin. *Quamvis ille niger, quamvis tu condidus esses.* English law, whatever oppression he may heretofore Let the negro be discharged."

See 20 St. Tr. 1-82.
The Lives of Chief Justices of Eng. III. 156, IV. p. 134.

If the statute here assailed be upheld, will not the practical effect be to legalize and establish a condition of involuntary servitude and virtual peonage—a condition that world-wide civilization and enlightenment has condemned as utterly destructive of the best elements of manhood in both servant and master?

Respectfully submitted,

Frank Dale

For Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
OCT 21 1910
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 300.

ALONZO BAILEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

SUPPLEMENTAL BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 300.

ALONZO BAILEY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

In Reply to the Brief of the Attorney General of the United States as Amicus Curæ, and to the Supplemental Brief for Plaintiff in Error.

From the time the statute was first considered by the Supreme Court of Alabama, in *Ex parte* Riley, 94 Ala., 82, to the present time, that court has *consistently held that the purpose of the statute was to punish fraudulent practices—not the mere failure to pay a debt;* and that *"a mere breach*

of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with the intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause." (*Ex parte* Riley *vs.* State, *supra.*) Or to state the holding in a different form, "While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet, when the individual enters into a contract *with the intent to perpetrate a fraud,* it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract. * * *

This is all that is effectuated by the legislation in question."

Bailey *vs.* State, 158 Ala., 18.

It is conceded, we believe, by counsel for plaintiff in error that a statute having the purpose and capable of the construction given to it by the Supreme Court of Alabama, creates an offense which is clearly within legislative competency. We have here a statute of the State of Alabama, which has been interpreted by the highest court of the State as defining such an offense; but counsel ask this court to disregard that interpretation and by an adverse construction to hold that the State law is repugnant to the Constitution and laws of the United States. The statute can only be held invalid by disregarding that construction. We again call attention to the rule, which has long prevailed, that "this court accepts the interpretation of a statute of the State affixed to it by the court of last resort thereof."

Tullis *vs.* Lake Erie Company, 175 Ala., 348.
Am. Steel & Wire Co. *vs.* Speed, 192 U. S., 523.
Missouri Co. *vs.* McCann, 174 U. S., 580.
Sioux Co. *vs.* Trust Co., 173 U. S., 99.
Smiley *vs.* Kansas, 196 U. S., 447.
Castillo *vs.* McConnico, 168 U. S., 674.

It is important to note the principle upon which this rule is founded.

In Tullis *vs.* Lake Erie Company, 175 U. S., 348, the court considered a statute of Indiana making a railroad company liable to an employee injured by the negligence of a fellow-servant. It was contended that the act violated the equality clause of the Fourteenth Amendment. Under the construction given the act by the State Supreme Court the statute was held to apply in a way to conform it to the Fourteenth Amendment. It was still insisted, however, in this court that by reason of the peculiar phraseology of the act the court should give a different construction to it; but the Supreme Court of the State of Indiana having held otherwise as to the proper interpretation of the act, this court held that such construction would be followed in this court. And the court responded to the question propounded by the Circuit Court of Appeals, "That the statute *as construed and applied* by the Supreme Court of Indiana is not invalid and does not violate the Fourteenth Amendment to the Constitution of the United States."

In American Steel & Wire Co. *vs.* Speed, 192 U. S., 500, it was contended that a tax statute of the State of Tennessee violated the Fourteenth Amendment by reason of a provision of the State Constitution that no article manufactured of the products of Tennessee should be taxed otherwise than to pay inspection fees. This provision of the constitution was construed by the Supreme Court of the State to refer only to a direct levy of taxation on articles manufactured of the products of the State, and not to apply to the tax levied upon merchants. The tax in question in that case was the merchant's tax, and, therefore, not within the purview of the exemption clause from which it was asserted the discrimination arose. The merchant's tax was construed to apply to all merchants, but it was insisted that this court should review that construction and hold that the exemption feature in the Constitution applied likewise to the mer-

chant's tax. But the court, through Mr. Justice White, held that "The construction of the State law being operative on persons doing a like business with the Steel Company, it follows that there was no discrimination. * * * *As this statute has been construed by the State court* as applying to all merchants, and as embracing alike all persons engaged in the character of business which the Steel Company was carrying on, it follows that there is no ground on which to predicate the complaint of undue discrimination."

In Castille *vs.* McConnoco, 168 U. S., 674, Mr. Justice White for the court said:

> "The vice which underlies the entire argument of the plaintiff in error, arises from a failure to distinguish between the essentials of due process of law under the Fourteenth Amendment, and matters which may or may not be essential under the terms of a State assessing or taxing law. The two are neither correlative nor coterminous. The first, due process of law, must be found in the State statute, and cannot be departed from without violating the Constitution of the United States. The other depends upon the law-making power of the State, and, as it is solely the result of such authority, may vary or change as the legislative will of the State sees fit to ordain. It follows, that to determine the existence of the one, due process of law, is the final province of this Court, whilst the ascertainment of the other, that is, what is merely essential under the State statute, is a State question within the final jurisdiction of courts of last resort of the several States. When, then, a State court decides that a particular formality was or was not essential under the State statute, such decision presents no Federal question, providing always the statute *as thus construed,* does not violate the Constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters *the State interpretation of its own law is controlling and decisive.*"

In Missouri, Kansas and Texas Railway *vs.* McCann, 174 U. S., 580-585, it was argued that the statute of Missouri, as interpreted in the highest court of the State, had the effect of depriving a railway company doing the business of interstate commerce of power to limit its liability under bills of lading to its own line, thereby imposing a direct burden on interstate commerce. But Mr. Justice White said:

> "The contention advanced in these several propositions is, however, without foundation, from the fact that it proceeds upon an erroneous assumption of the purport of the Missouri statute in question, since the Supreme Court of Missouri, in applying that statute in the case before us, has, in the most positive terms, declared that it was not intended to and did not prevent a carrier engaged in interstate commerce traffic from limiting his liability to his own line, and that far from doing this the statute left the carrier the amplest power to make such limitation in receiving goods for interstate carriage and in issuing a through bill of lading therefor. * * * The reasoning now relied on then is, that, although the Supreme Court of the State of Missouri has interpreted the statute of that State as not depriving a carrier of power, on receiving an interstate shipment, to limit its liability to its own line, this court should disregard the interpretation given to the State statute, by the court of last resort of the State, and hold that the statute means the very contrary of its import, as declared by the Supreme Court of the State, and upon such construction decide that the State law is repugnant to the Constitution of the United States. But the elementary rule is that this court accepts the interpretation of the statute of a State affixed to it by the court of last resort thereof. * * * Considering the statute as thus interpreted by the Supreme Court of the State of Missouri, it cannot be held to be repugnant to the Constitution of the United States."

Without further discussion of the cases the rule is settled beyond question that this court will accept the construction

placed by the highest State court upon its own statute; and then this court will determine *whether the statute as thus construed*, violates the Federal Constitution or laws. If the basal fact of the offenses as defined and declared by the Alabama court is fraud, then the question of the conflict of this statute with Federal provisions is easy of solution.

In the supplemental brief, by an ingenious course of reasoning, counsel insist that the punishment for which the statute provides is rested on and can be justified only because there has been an unjust abandonment of the contract without just cause, and this statement founded on the next clause, to wit, that it cannot be based on anything else, because none of the antecedent frauds mentioned in the statute or all of them combined are criminal offenses. *The premise is false.* In the Riley case the court declared in language that cannot be misunderstood, that a mere *breach of a contract is not by the statute made criminal; and that the criminal feature was wanting unless the accused entered into the contract with the intent to injure or defraud and unless the refusal to perform was with like intent.* So that coupled with the abandonment without just cause, and as a part of it, there must exist a criminal intent on the part of the defendant. Is it fair to thus argue the case and to so far disregard the plain letter and meaning of the statute? Certainly counsel cannot plead ignorance of this established construction of the statute by the Alabama court. The statement is a clear perversion of the language of the statute quoted in the assignments of error in the brief; and leads to the conclusion that the statute reads *if any person enters into a contract for personal service and fails without just cause to perform it, he is guilty regardless of any fraud in the making or abandonment of it.* This, in effect, is the statute held void in Toney *vs.* State, 141 Ala., 120.

It would have been competent for the legislature to define the offense as consisting only of written contract, the fraudulent representation by the employee that he would

perform personal service, the obtaining of money on the faith of the contract, and representation, and the failure to perform the service with like intent to defraud—regardless of whether the money obtained was restored or the contract under which it was obtained was breached without just cause. But the legislature went further than was necessary and required the prosecution to show an abandonment without just cause and a failure to restore the thing fraudulently obtained, thus giving to the defendant the benefit of the restoration of the property of a cause for quitting if it be a just one, notwithstanding the criminal offense committed by him. This is merely of benefit to the defendant, and he certainly is in no position to complain. If it would have been competent for the legislature to define the offense, omitting all reference to quitting the service, certainly the statute is good with that feature. (Freeman *vs.* U. S., 217 U. S., 539; State *vs.* Nicholson, 67 Md., 1.)

It is further insisted that in its last analysis the statute punishes an American citizen because he exercises the fundamental right of quitting, without just cause, the performance of a contract of personal service, the enjoyment of which is secured to him by the Constitution and laws; but, as pointed out above, this "last analysis" is not justified, either by the words of the statute or by the construction thereof by the Supreme Court of Alabama, and therefore no punishment is imposed upon the exercise of this alleged "fundamental right." It is also said that the State has no power to declare that a person shall not exercise this right because prior to its exercise he may have offended against some law of the State. But the statute does not make that declaration. The State has the right to use the defendant's subsequent conduct, to wit, the fact of the abandonment of the contract, *as evidence that he originally intended to defraud.* The whole theory of this argument of counsel is based on the assumption that the original contract was honest and not fraudulent. But, as is said, the ordinary, natural, and inevitable

result of the statute, if allowed effect, being the compulsory performance of labor against the will of the employee, the statute is void. The statute does not compel the service under a contract, but merely punishes the employee under State sovereignty for the fraud; and there is no evidence in the record that the statute has the result mentioned.

But this aside, counsel say, the words and frame-work of the statute demonstrate that its purpose was not to punish fraud or to protect morals, but to compel performance of a contract for personal service. It is immaterial what counsel may think the legislature intended. The court has construed the statute otherwise, and that construction will be here accepted as conclusive. It is strange, indeed, that this foreign purpose has to this day failed of discovery by the Alabama courts and by Judge Jones, of the Federal District Court of Alabama, who held it constitutional in 1903. (Peonage Cases, 123 Fed., 690.)

It is further said that *the obtaining of money or property by a fraudulent promise to render personal service in the future not meant to be kept in whatever form accomplished can undoubtedly be made a crime by the State whether or not the thing fraudulently obtained is restored and whether or not the contract under which it was obtained was breached with or without just cause.* It must be admitted that the Alabama Supreme Court has construed this to be the plain meaning of the statute. It is then said that the statute purposely and studiously refrains from making the fraud mentioned therein the crime which is punished. This is just what the statute does if we look to the language of the statute and to its construction by the Alabama court. The only evidence contra is the statement of counsel. If the statute had declared it a crime to fraudulently enter into a contract and thereby obtain money, with no intent to perform, but simply to appropriate the money, it is admitted that the law would be valid; but counsel say because the statute permits the defendant to relieve himself by performing the en-

tire act is invalid; but this conclusion is unsound. (Freeman *vs.* U. S., 217 U. S., 539.) Counsel also refer to what is said to be a constitutional right to abandon a contract without just cause. We deny that the Constitution guarantees any man the *right* to abandon his contract, for if that were true no civil action could be maintained for its breach. This is a confusion of ideas. The most that can be said is that it guarantees a defendant against imprisonment for a mere abandonment of the contract. But in the case at bar the abandonment is not made an element of the fraud, but under the rule of evidence is *merely evidence of the fraud*, and by no sort of construction can it be held that the defendant is punished for an abandonment.

The Fourteenth Amendment.

It is admitted by opposing counsel that the statute would declare a valid rule of evidence if limited to cases where the defendant made a contract for immediate service, and immediately refused to enter upon it, for it is said that refusal might support an inference of his specific intent. This admission is decisive of the validity of the statute. If the defendant would have committed a fraud if he had immediately refused to enter upon the performance of his contract, that conclusion of fraud is the result of his subsequent refusal. With the lapse of time, the presumption of fraud becomes weaker.

In Considine *vs.* United States, 112 Fed., 342 (6 C. C. A.), heard before Circuit Judges Lurton, Day and Severns, opinion by Judge Day, the defendant was convicted of breaking and entering the post-office at Granville, Ohio, on October 15, 1896. He was arrested December 25, 1896, in Chicago, after undertaking to pass a money order, which was taken from the Granville post-office. The lower court charged the jury that if the defendant was in the town of Granville on the night the post-office was broken into, and there passing

under an assumed name, and that if afterwards some of the property which was stolen on that occasion was found in his possession, then the jury might infer that he was one of the persons who broke into the post-office and robbed it, unless he explained his possession of the stolen property in such a way as to show that he *was not, and could not have been,* connected with the breaking of the post-office; and the defendant requested the court to charge the jury that the fact of the goods being in his possession at Chicago on December 25 raised no presumption that he committed the crime. The charge was refused and Judge Day, for the court, said:

> "The unexplained possession of goods recently stolen, is entitled to more or less weight as an inculpatory circumstance, *depending upon the fact of each case,* and unless rebutted by the evidence, or explanation of the accused, the jury may act upon it. The term 'recently' in this connection, has no fixed and definite meaning, and is a variable term, depending upon other circumstances."

The theory upon which the defendant would have been guilty if he had abandoned the contract immediately, was and is the same theory upon which the presumption referred to by Judge Day is founded. The abandonment in the case suggested by opposing counsel was immediate and recent, and the presumption obtained; while in the case at bar, being thirty-four days subsequent to the making of the contract, the presumption could not obtain, according to their contention, and to admit it, even for the consideration of the jury, was a denial of due process of law; when, in truth, the weight to be attached to the possession of the fruits of the crime depends upon the facts of each case, and it is for the jury to find as a fact the existence of a criminal intent, after considering the abandonment and its *prima facie* legal effects. If it be admitted that the crime would have been complete if the defendant had immediately aban-

doned it, then this court, if it undertakes to decide this question, becomes a trier of facts, and is merely weighing the evidence before the jury, in determining whether the jury was warranted in finding a criminal intent. It is the rule in Alabama that the Supreme Court cannot revise the action of the lower court in refusing a new trial to the defendant; and the effect of the present contention is to invite this court to weigh the evidence and, if it be found insufficient, to grant to the defendant a new trial. This goes, not to the validity *vel non* of the statute, but to the sufficiency of the evidence to convict. This the court will not do (Smiley *vs.* Kansas, 196 U. S., 447).

It is also contended that the rule of evidence contained in the statute violates the Fourteenth Amendment in that the State constitution ordains that the right of trial by jury shall remain inviolate, and that the enjoyment of this right, as it is afforded to all other persons in like circumstances, is a part of the due process the Fourteenth Amendment commands the State to afford when it prosecutes persons for crime. If the statute declared that the abandonment was conclusive evidence of the fraud, it could not be sustained. But the legislature has merely given to the act of abandonment a *prima facie* presumption which the jury may accept or disregard at will. The Alabama Supreme Court expressly held, in the case at bar, that the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. It is still open for the jury to find him not guilty—therein is the fallacy of the contention of the opposing counsel. A like argument seems to have been in Adams *vs.* N. Y., 192 U. S., 585, and was made in practically all of the cases in which the courts of the land have sustained rules of evidence. This contention would lead to the invalidity of that long-established principle that the recent possession of stolen property is presumptive evidence of guilt.

Consedine *ex.* U. S., 112 Fed., 342. A burden similar to this is placed upon every defendant in whose possession recently stolen property may be found; and also prevails in certain civil cases where a conveyance is attacked for fraud by an existing creditor. Proof that the debt existed when the conveyance was made under a charge that it was fraudulent, casts the burden upon the defendant of proving the *bona fides* of the transaction.

It is said ordinarily men who make contracts and get advances do not mean at the time to defraud. Probably so, ordinarily, but the contrary frequently happens, and the legislature has the right to declare its *prima facie* effect. And it is also said that the formation of the criminal intent generally arises subsequently; and if that is conceded to be generally true, yet the legislature has the right to put the burden upon anyone to show that he does belong to the general class and not to the excepted one, granting for the sake of argument that such classification is correct.

The further insistence that the statute *compels* the jury to draw the inference of guilt, merely from the unlawful quitting, is a perversion of the statute.

Without Just Cause.

If we understand the argument of counsel it is that the legislature should have defined "just cause"—that is, should have laid down the facts going to make up or to show in every case whether the accused was or was not without just cause. In all the varied conditions of human affairs the mind of no man could conceive of every situation which would constitute just cause for the abandonment of a contract, and any attempt to lay down such facts would have been in itself futile. The words "just cause" include any legal defense for the breach of a civil contract. And if it be left for the jury to say whether the cause of quitting was a just one under the fact of each case, the defendant has

still greater rights of defense than if the law attempted to define that term. If there is merit in this contention it leads to the conclusion that the statute is void for uncertainty. The point having been made before and decided by the Supreme Court of Alabama, the question is not now open to this court. No element of a Federal question is involved in its determination.

ALEX. M. GARBER,
Attorney General;
THOS. W. MARTIN,
Assistant Attorney General,
For the Defendant in Error.

Supreme Court, U. S.
FILED.
OCT 15 1910
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM 1910.

No. 369.

ALONZO BAILEY,
Plaintiff in Error.

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF ALEXANDER M. GARDNER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

Brown Printing Co., Montgomery, Ala.

SYNOPSIS.

	Page
The Statutory Offense	4
Validity of Original Statute	8
The Thirteenth Amendment and Peonage Statute	12
The Fourteenth Amendment	19
Due Process of Law	26
Power to Establish Prima Facie Rule of Evidence	28
Inability of Defendant to Prove Mental Status	37
Statute Separable	43
Statute not Void for Uncertainty	44

IN THE

Supreme Court of the United States.

OCTOBER TERM 1910.

No. 300.

ALONZO BAILEY,
Plaintiff in Error.

vs.

THE STATE OF ALABAMA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF OF ALEXANDER M. GARBER, ATTORNEY GENERAL, AND THOMAS W. MARTIN, ASSISTANT ATTORNEY GENERAL, FOR THE DEFENDANT IN ERROR.

Plaintiff in error was indicted by the Grand Jury of the City Court of Montgomery on the charge of obtaining fifteen dollars from The Riverside Company with the intent to injure or defraud this company by entering into a written contract to perform labor or services for the com-

pany; and afterwards, with such intent and without just cause, failing or refusing to perform the labor or services or to refund the money. He was convicted on the charge and on appeal the judgment of conviction was affirmed by the Supreme Court of Alabama, (161 Ala. 79), and this judgment is now brought to this court on writ of error.

On the trial in the City Court the plaintiff in error demurred to the indictment on the grounds, in substance, that it violated the Thirteenth and Fourteeth Amendments of the Constitution of the United States, and sections 1990 and 5526 of the Revised Statutes of the United States. All questions were decided against plaintiff in error in an elaborate opinion by Mr. Justice Denson of the Supreme Court of Alabama.

THE STATUTORY OFFENSE.

Prior to 1885 Section 4370 of the Code of 1876 was in the following language:

> "Any person, who, by any false pretense, or token, and with the intent to injure or defraud, obtains from another any money or other personal property, must, on conviction, be punished as if he had stolen it."

The law under which this prosecution was begun had its origin in the act of the General Assembly of Alabama, approved Feb. 17, 1885 (Acts 1884-5, p. 142), being an act to amend said section 4370, so as to read as follows, the new matter being in italics:

> "Any person who by any false pretense or token and with the intent to injure or defraud, obtains from another any money or personal property or *any person who has entered into a written contract with, at the time, the intent to defraud, to do or to perform any act or service and in consideration thereof ob-*

tains from the hirer money or other personal property, and who abandons the service of such hirer without just cause, without first repaying such money or other advances, and with the intent to injure or defraud must, on conviction, be punished as if he had stolen it."

The statute as thus amended was carried into the Code of 1886 as two sections, numbered 3811 and 3812, the former being identical with original Section 4370 of the Code of 1876. The new matter added by the Act of February 17, 1885 constituted Section 3812, and was slightly changed in verbiage to read as follows: "Any person, who, with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses to perform such act or service, must, on conviction, be punished as if he had stolen it." The Section next appeared in the Code of 1896 as Section 4730, without change.

The Act of the Legislature approved October 1, 1903, (General Acts 1903, p. 345) amended said section 4730, of the Code of 1896, so as to read as follows, the new matter being in italics:

"Any person who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or servce, must, on conviction, be punished as if he had stolen it. *And the refusal or failure of any person, who enters into such contract, to perform such act, or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure or defraud his employer.*"

The Act of August 15, 1907 (General Acts 1907, p. 636), further amended said section 4730 so that as amended the same reads as follows, the new matter being in italics:

> "Any person who with intent to injure or defraud his employer, enters into a contract in writing for the performance of any act or service and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must, on conviction, be punished *by fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured; and any person, who with intent to injure or defraud his landlord, enters into any contract in writing for the rent of lands, and thereby obtains any money or other personal property from such landlord, and with like intent, and without just cause, and wthout refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must, on conviction, be punished by fine in double the damage suffered by the injured party, but not more than* $300.00, *one-half of said fine to go to the county and one-half to the party injured.* And the refusal or failure of any person who enters into such contract, to perform such act or service *or to cultivate such land,* or refund such money, or pay for such property, without just cause shall be prima facie evidence of the intent to injure *his employer or landlord or to defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed.*"

This statute now appears as section 6845 of the Code of 1907, but the Code was adopted before the act was passed, and is printed in the Code merely for convenience.

Thus it will be seen that the statute now under attack first appeared in the Act of February 17, 1885, as an amendment to the then existing statute punishing the ob-

taining of money or personal property by a false pretense or token, with the intent to injure or defraud. Shortly prior to the time the original Act became the law one Colly was indicted for obtaining goods by falsely pretending that he would labor on the farm of Bush, but the Supreme Court of Alabama held that the offense was not within the statute, which decision doubtless led to the Amendment of February 17, 1885. (Colly v. State, 55 Ala. 85.)

It is important in the outset to bear in mind the history of this Legislation because it is essential to a comprehension of the matters here arising for decision. This history sheds light upon the additional purpose and meaning of the Legislature, which purpose, as we shall show, was original and at all times continued to be the desire of the Legislature to punish the obtaining of property by such false pretenses.

The plaintiff in error now insists, in substance, that the statute under which he was indicted deprives him of his liberty without due process of law, and that it denies to him the equal protection of the laws and is, therefore, opposed to the Fourteenth Amendment of the Constitution of the United States; that it imposes involuntary servitude upon him in violation of the Thirteenth Amendment, and that it violates the Federal Statute against peonage.

This case being brought to this Court by writ of error to the Supreme Court of Alabama, the jurisdiction of this Court "is limited to the question whether the plaintiff in error has been denied a right in violation of the Constitution, laws, or treaties of the United States. The question whether his imprisonment is illegal, under the Constitution and laws of the State is not open to us."

Yick Wo v. Hopkins, 118 U. S. 360; 30 L. 220;
Barbier v. Connolly, 113 U. S. 27; 28 L. 923.

VALIDITY OF ORIGINAL STATUTE.

The statute as originally passed, did not contain what is termed in the case the *prima facie rule of evidence;* and when this case was first heard on habeas corpus no attack was made upon the validity of this statute; indeed was admitted to be valid (Bailey v. State 158 Ala. 18; 211 U. S. 453); and it is not certain whether the entire statute or merely the rule of evidence is now attacked by the plaintiff in error; but assuming the whole statute to be in question, we consider it from that standpoint.

The power of the State Legislature to define and punish crime is thus stated in 12 Cyc. 136: "The Legislatures of the different States have the inherent power to prohibit and punish any act as a crime provided they do not violate the restrictions of the State and Federal Constitutions; and the courts cannot look further into the propriety of a penal statute than to ascertain whether the Legislature had the power to enact it."

As pointed out above, this statute was designed to punish a certain class of frauds which were then not punished by any statute.

The original and amended statute has been frequently construed by the Supreme Court of Alabama and the court has consistently held that the purpose of the statute was to punish fraudulent practices and not the mere failure to pay a debt.

The offense is but a species of the common law crime of cheating by false pretenses, and if in fact the statute does define and punish a crime, there can be no question here of its validity.

In Riley v. State, 94 Ala. 82, where the statute was first construed at length, the court held that, "The effect of this statute is to provide for the punishment criminally of a certain class of frauds which are perpetrated by means of promises not meant to be kept. These frauds closely

resemble those perpetrated by means of false pretenses or tokens, but are not punishable under the statute on that subject, as a false pretense is a false representation relating to some existing or past fact, and does not include of something to be done in the future. * * *This statute by no means provides that a person who has entered into a written contract for the performance of services, under which he has obtained money or other personal property, is punishable as if he had stolen such money or other personal property, upon his refusal to perform the contract, without refunding the money or paying for the property.* A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting *unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform was with like intent and without just cause.*"

And in Bailey v. State, 158 Ala. 18, after reviewing the principal cases Judge Denson said: "While it is clear that a mere breach of contract cannot be made the foundation for a criminal offense, and that undue restrictions cannot be placed on the right of an individual to enter into contracts, yet when the individual enters into a contract, *with the intention to perpetrate a fraud*, it is equally obvious that he passes over the constitutional boundary line in respect to the free right to contract; and it is within legislative competency to enact a law penalizing the entering into a contract with such intent, and obtaining money or other personal property through such agency. This is all that is effectuated by the legislation in question."

On the other hand in Taney v. State, 141 Ala. 120, the court considered the statute adopted in 1901, which attempted to declare it a penal offense for one under written contract to labor or serve another or cultivate lands for a given time, who before the expiration of that time abandoned the contract without the consent of the other, and with-

out sufficient excuse, and makes a second contract with another person, without giving the latter notice of the existence of the first contract. But the court very properly held, that "Because of the restrictions it purports to place on the right to make contracts for employment, and concerning the use and cultivation of land, this act is wholly invalid."

In the elaborate opinion of Judge Jones in the Peonage Cases he referred to the original statute, and said:

> "It applies to all classes of persons who commit the designated offense, and does not single out any particular class. This statute is constitutional. *Persons duly convicted of violating its provisions and put to labor in consequence, are lawfully undergoing involuntary servitude.*"
>
> 123 Fed. 671, 690.

In ex parte Drayton, 153 Fed. 986, Judge Brawley considered a statute of South Carolina which provided for the punishment of any person who entered into a contract to farm and cultivate lands, and who without just cause or excuse deserted or quit the land; and rightly held that this statute violated the Federal Constitution. In the course of the opinion Judge Brawley referred to the statute declared unconstitutional in Toney v. State, 141 Ala. 120, which was much the same as the statute which he considered; and with respect to the *statute we are now considering* the learned Judge quoted the excerpt from Judge Jones's opinion in the Peonage Cases which we have set out above and then said:

"This Alabama statute, as will be seen, is of a general nature. It applies to all persons who enter into contracts with intent to injure or defraud, and declares that persons who obtain money with such intent shall be punished as if they had stolen it. The essence of this statute is the

obtaining money with fraudulent intent, which in many of the States is declared a criminal offense. The essence of the South Carolina statute is the coercing of personal services in liquidation of a debt." In the later case of United States v. Clement, 171 Fed. 974, no State statute was involved, the case being merely one of violation of the Federal peonage statute. This opinion was also written by Judge Brawley, and is relied upon by opposing counsel but is no authority against the statute under consideration.

In Lamar v. State, 120 Ga. 312, the court said with respect to the statute of that State: "If the Act prescribes a punishment for a simple violation of a contractual obligation, it is beyond the power of the General Assembly. But if its purpose is to punish for fraudulent and deceitful practices, it is valid, even though the fraud or deceit may arise from a failure to comply with a contractual engagement. Fraudulent practices which resulted in one obtaining the money or property of another were in a number of instances denounced as crimes by the common law; and by statute both in England and in this country a number of such practices have been declared to be crimes, although the particular practice was not embraced within the definition of any common law offense. The right of the law making power to declare fraudulent practices a crime does not seem to have ever been seriously questioned."

In State v. Williams, (N. C.) 63 S. E. 949, the court held a statute to be void which punished the mere wilful abandonment of the crop by the tenant; this upon the ground that "*the offense here charged has no element of fraud* and as the statute imposes imprisonment it cannot be sustained."

In ex parte Hollman, 79 S. C. 9[illegible]; 21 L. R. A. (N. S.) 242, a statute of South Carolina similar to the Alabama statute considered in the Toney case was held to be void.

Throughout the opinion the court recognizes the validity of those statutes which contain the element of fraud—as in the case of the statute we are considering.

On the whole, we say without fear of contradiction, that no case can be found from any jurisdiction in which a statute similar to the one under consideration has been held to be invalid.

THE THIRTEENTH AMENDMENT AND PEONAGE STATUTE.

Counsel insist that the statute violates the Thirteenth Amendment and the Peonage Statute. The basis of this argument is, *not that the rule of evidence* subjects the convicted defendant to a condition of peonage, but that *the original statute* has that effect. Unless, therefore, the court holds the original statute to be invalid, there can be no condition of peonage incident to a conviction thereunder. The rule of evidence does not, of itself, or as an amendment to the original statute, make a condition of peonage.

The statute we are now considering is wholly different from the law held to be obnoxious to the State Constitution, in Toney v. State, 141 Ala. 120; and in the Peonage Cases, 123 Fed. 671. As said by Judge Denson in Bailey v. State, 158 Ala. 18, the *"intent to injure or defraud* marks the line of cleavage between the statute in judgment and the one" held bad in Toney's case, supra.

Again in State v. Vann, 150 Ala. 66, the Court pointed out that "Under the former construction of the statute by this Court, while the essence of the crime is a fraudulent intent, the statute is intended to prevent fraud and not to imprison for debt."

And in Bailey v. State, 158 Ala. 18, the Court, after reviewing the cases, held that:

"It is within legislative competency to enact a law penalizing entering into a contract, with such intent, (to perpetrate a fraud) and obtaining money or other personal property through such agency.

"This is all that is effectuated by the legislation in question. On its face the purpose is to punish fraudulent practices, not the mere failure to pay a debt. Thus considered, it is constitutional."

It is further contended that the statute was not meant either to prevent employees from making fraudulent contracts or to prevent them from obtaining money by promising service. The various excerpts from the decisions of the Alabama Supreme Court which are made use of by counsel, conclusively show that the statute had this purpose. In McIntosh v. State, 117 Ala. 127, Judge Brickell pointed out that "The rendition of service by the defendant for a period more than sufficient to have repaid the money takes away an essential ingredient of the offense." The Legislature saw fit to require several facts to exist before the offense was completed and among which was the non-payment of the money so fraudulently obtained It might or not in its own discretion have been just as competent for the Legislature to provide that the employee should be guilty if he entered into the contract with a fraudulent purpose of obtaining the money—and did obtain the same, without giving him the benefit of a subsequent re-payment. *The offense is merely condoned in the event of such payment.* All of the present argument of counsel goes to the validity *vel non* of the original statute. In fact the greater portion of the argument for plaintiff in error necessarily comes to that question. The Alabama Court has pointed out time and time again that the *essential* ingredient of the offense is fraud in entering into the contract of employment. If ulterior motives and purposes on the part of the Legislature had ex-

isted in fact, it is strange that up to the present period such motives have failed of discovery by the Alabama Court. And yet several of the greatest jurists that the Alabama Supreme Court can claim have passed upon and upheld the original statute. If the present statute is condemned, this Court should go further and destroy every statute which is aimed at the obtaining of goods of another by false pretenses. The victim in all such cases has a civil right of action against the party who thus obtains his money. But the fact of the existence of such civil right has never until this day been considered as depriving the State of its inherent right to punish the criminal act involved in that transaction. The fraudulent *violation* of the contract of employment was not and could not be made punishable criminally.

The Alabama Supreme Court has held that the basal fact is fraud and that the statute does not violate the provision of the State Constitution against imprisonment for debt. This construction of the State Constitution is conclusive on this court; (Yick v. Hopkins, 118 U. S. 360; Noble v. Mitchell, 164 U. S. 367) and the only question left for determination is whether the statute *as thus construed* violates the Thirteenth Amendment or the Peonage Statute. (Mo. Co. v. McCann, 174 U. S. 575; Am. Steel & Wire Co. v. Speed, 192 U. S. 523). This Court cannot hold the law to be violative either of that amendment or of the Peonage Statute except on the theory that it imprisons for a debt.

In Clyatt v. United States, 197 U. S. 207, Mr. Justice Brewer said, with respect to peonage:

> "The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in Jaremillo v. Romero, 1 N. M. 190, 194: 'One fact existed universally: all were indebted to their masters. This was

the cord by which they seemed bound to their masters' service.' Upon this is based a condition of compulsory service. * * * *That which is contemplated by the statute is compulsory service to secure the payment of a debt.*"

In the case of Freeman v. United States, 217 U. S. 539, this court considered certain articles of the Phillipine Code, and held that the same did not imprison for debt. Freeman was found guilty of embezzlement, and sentenced to imprisonment for one year and nine months, and to restore to the parties injured the amount misappropriated, or in lieu thereof, to suffer subsidiary imprisonment for the period of seven months, and to pay the costs of prosecution. Thus it will be seen that not only was a punishment imposed for the crime committed, but in addition, a subsidiary imprisonment, from which he would be released if he paid the amount embezzled. It was contended that this punishment was in accordance with certain articles of the Philippine Code, and this court held that the same did not violate the provision of the act of Congress of July 1, 1902, that no person should be imprisoned for debt.

"Statutes relieving from imprisonment for debt," said Mr. Justice Day, "were not intended to take away the right to enforce criminal statutes, and punish wrongful embezzlements or conversions of money. It was not a purpose of this class of legislation to interfere with the enforcement of such penal statutes, although it provides for the payment of money as the penalty of the commission of an offense. Such laws are rather intended to prevent the commitment of debtors to prison for liabilities under their contracts. * * *

"This general principle does not seem to be controverted by the learned counsel for the plaintiff in

error, and the argument is that inasmuch as the money adjudged is to go to the creditor, and not into the public treasury, imprisonment for the non-payment of such sum is an imprisonment for debt. But we think that an examination of the statutes of the Philippines, and the judgment of the Supreme Court, shows that the imposition of the money penalty was by way of punishment for the offense committed, and not a requirement to satisfy a debt contractual in its nature, or be imprisoned in default of payment."

By reason of the fact that the present statute provides that the offense may be condoned by repayment of the money or advances, it is insisted that this provision shows its purpose to be imprisonment for debt. But the Alabama Supreme Court held with respect to this point that the statute merely condoned the offense by permitting the repayment of the money advanced. (State v. Vann, 150 Ala. 66.) And if a provision of the Philippine Code which imposes a subsidiary punishment which is discharged by the payment of money to the creditor is a valid provision, certainly no objection can be raised to the provision now in question, which condones the offense before the judgment of conviction. Indeed, it would have been permissible for the statute to have provided for the discharge of the penalty imposed, upon the repayment of the money or advances after the conviction,—and this provision would have been good, under the authority of the Freeman case. In the language of Mr. Justice Day, "The requirement that there shall be no imprisonment for debt was intended to prevent the resort to that remedy for the collection of contract debts, and not to prevent the state from imposing a sentence which should require the restoration of the sum of money wrongfully converted in violation of a criminal statute. *The nonpayment of the money is a condition upon which the punishment is imposed.*"

We also call attention to the concluding paragraph of the opinion in the Freeman case, in which this court held against the suggestion of plaintiff in error, that the subsidiary imprisonment should be discharged, and the injured party left to his civil action to recover the sum lost for the reason that the imprisonment would satisfy the judgment there rendered to the extent of the amount found by the judgment to have been embezzled, leaving the injured party to his action at law to recover any additional sum arising out of the same cause of action; and it was suggested that this possibility was so wholly unjust that it ought not to be permitted in any state subject to American jurisdiction.

> "But," said the court, "we see no reason why the court may not, for the purpose of the criminal proceedings, find the amount wrongfully converted by the defendant, for the purpose of fixing the sentence in this case, leaving the firm defrauded to recover in a civil action in a sum or sums in excess of that amount which may be found due and remain unpaid to them."

And, for the reasons given in the Freeman case, the provision of the present statute which provides for a fine in double the damage suffered by the injured party, half to go to the county and the other half to such party, is valid.

"* * * the money payment was part of the punishment, and was not imposed as an imprisonment for non-payment of the debt, regardless of the criminal offense committed. The sentence, and each part of it, was imposed *because of the conviction of the defendant of the criminal offense charged.*" Freeman v. U. S. *supra.*

In Re Ebenhack, 17 Kan. 615, which is cited in the Freeman case, Judge Brewer, afterwards Mr. Justice

Brewer, of this court, held that a provision of the Kansas statute which imposed costs in certain cases upon the prosecutor as a penalty, did not "constitute strictly and simply a debt, in the technical sense of the word, any more than the fine imposed upon a party convicted of assault and battery is a debt."

And in the case of Maryland v. Nicholson, 67 Md. 1, which is also cited in the opinion in the Freeman case, the statute provided that if a collector of taxes neglected to pay the same for six months, he should be deemed a defaulter, and upon conviction, punished by imprisonment, unless the amount for which he was convicted as a defaulter was sooner paid. It was contended that the last clause rendered the statute one of imprisonment for debt; but the court said:

> "Nor is it any objection to the statute that it provides, upon the payment of the money for which he is in default, either before or after conviction, such collector shall be dscharged, *for the reason that the Legislature has the right to prescribe the terms and conditions upon which the punishment shall be imposed.*"

In State v. Yardley, 95 Tenn. 546, the court aptly states the rule as follows: "The offense consists not in the creation of a debt, nor in its non-payment, but rather in the fraud through which credit (for board) may be procured or payment evaded. The latter, and not the former, is the thing for which punishment is to be inflicted. As well said by one of the attorneys for the state, the Legislative intent was 'to punish the debtor for his fraud, and not for his debt.'" We earnestly insist that the statute cannot by any canon of construction be held to imprison for debt.

THE FOURTEENTH AMENDMENT.

It is contended that the Act violates the Fourteenth Amendment in that it applies only to persons who enter into contracts for the performance of an act or service or for the rent of land; that it does not bear equally upon the employee and the employer, and that it is applied only against laborers and the colored race.

As we pointed out before, the statute had its origin as an amendment to the statute punishing the obtaining of money or other personal property by false pretenses. Every person within the State of Alabama is subject to punishment for obtaining money by a false pretense and it is not contended that such statute denies to anyone the equal protection of the laws.

The present statute, on its face, likewise applies to every person who with a fraudulent purpose enters into a written contract to perform an act or service for another, and thereby obtains money. So that we come to the question of the right of the Legislature to classify objects of legislation. With respect to this question, Mr. Justice McKenna said in Clark v. Kansas City, 176 U. S. 144, 44 L. 392:

> "It is enough to say that the rule of the Constitution leaves to the discretion and wisdom of the State a wide latitude as far as interference by this Court is concerned. It is not a substitute for municipal law; *it does not invest power in this Court to correct the impolicy and injustice of State laws*, and the quality it prescribes is not for persons merely as such, but according to their relations."

And in Magoun v. Illinois Trust & Savings Bank, 170 U. S. 282, 42 L. 1037, the same Justice said:

> "It (the 14th Amendment) does not prohibit legislation which is limited, either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subject to such legislation shall be treated alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed. With these for illustration, it may be safely said that the rule prescribes no rigid equality and permits to the discretion and wisdom of the State a wide latitude so far as interference by this Court is concerned. * * * Nor with the impolicy of a law has it concern. Mr. Justice Field said in Mobile County v. Kimball, 102 U. S. 704, that this Court is not a harbor in which can be found a refuge from ill advised, unequal and oppressive State legislation."

In the case of Moore v. Missouri, 159 U. S. 673, 40 L. 301, Mr. Chief Justice Fuller said with respect to this question:

> "The 14th Amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.'" * * *

In Powell v. Pennsylvania, 127 U. S. 678, Mr. Justice Harlan said with respect to a statute directed at the manufacture of oleomargarine: "The statute places under the same restrictions, and subject to like penalties and burdens, all who manufacture and sell, or offer for sale, or keep in possession to sell, the articles embraced by the prohibitions; thus recognizing and preserving the principal of equality among those engaged in the same business."

And in So. Ry. Co. v. Greene, 216 U. S. 400, Mr. Justice Day said that, "The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."

In Halter v. Neb., 205 U. S. 34, this court considered a statute of Nebraska which prohibited the use of the National flag upon articles of merchandise for advertising purposes, with the proviso that it should not apply to newspapers, etc., disconnected from any advertisement. The court, through Mr. Justice Harlan, upheld the statute as against the contention of an arbitrary classification, in this language: "It was for the State of Nebraska to say how far it would go by way of legislation for the protection of the flag against improper use,—taking care in such legislation not to make undue discrimination against a part of its people. * * * All are alike forbidden to use the flag as an advertisement. * * * In any event the classification made by the State cannot be regarded as unreasonable or arbitrary or as bringing the statute under condemnation as denying the equal protection of the laws."

Again in M. K. & T. R. Co. v. May, 194 U. S. 265; and in Lemieux v. Young, 211 U. S. 489, the court sustained the classifications as made by the statutes there involved. In the case last cited the bulk-sales law of Connecticut was considered and upheld. This statute applied only to retail merchants, imposing upon them the duty of notifying their creditors before selling either the whole or a large part of their stock in trade. If the classification of retail merchants is sustained certainly the Legislature may prohibit all employees from obtaining money by falsely pretending that they will work for a given time.

This entire contention is answered by the language of Judge Denson in the instant case: "This point is aside from the mark, for the reason that the crime denounced by the statute is not the mere breach of the promise, or

failure, to perform service according to the terms of the contract; but * * * the criminal feature by the statute reprehended is the entering into a contract with the intent to injure or defraud, or the refusal of the employe to perform the contract, with like intent.

"It may be that the Legislature could have made the fraudulent refusal of the employer to pay the wages of the employee, a crime, (this point we do not decide); but simply because the present statute does not comprehend criminality on the part of the employer, does not argue or demonstrate its invalidity, on the idea of inequality in its operation. The crime denounced is not one against the person or property of the employer, *but one against the dignity of the State,—against the sovereignty.*"

Answering a suggestion of this kind in State v. Chapman, 56 S. C. 420, the court said: "It is clear, therefore, that there is no discriminating feature in the Act of 1887 and we do not see how there could be one, inasmuch as laborers never make advances either in money or supplies to land-holders."

In Dreyer v. Payne, 88 Fed. 978, Judge Showalter used the following language concerning the Illinois Bank Statutes:

> "The law here in question is applicable to any person whose conduct falls within the definition of the offense. How wide or how narrow that definition shall be is a question of the Legislature.* * **I am not able to say that taking money as a deposit by an insolvent banker under pretense of solvency is a right guaranteed by the fourteenth amendment. A law which makes the obtaining of money by false pretense a crime would hardly be invalid on the ground that a person using the same pretenses, but failing to obtain and appropriate money or property thereby, would not be punishable.* The circumstances

that, by the terms of the statute in question, the repayment on demand must be lost to the depositor in order to make the offense, is not a valid objection. *Nor as long as any person whose conduct falls within the definition of the offense is liable to the penalty prescribed do I see that the equal protection of the laws is denied.* * * * The penalty of the statute here in question, goes without discrimination against any person whose conduct falls within the definition of the offense."

The covert suggestion in brief of counsel for plaintiff in error, that the statute is void, for that it is applied to negro laborers and negro tenants and not to all classes of employees is not borne out by the record. As pointed out by Judge Denson in his opinion in the case at bar: "If this statute referred to a particular class of individuals * * * then we should not hestitate to declare the enactment void. But no such interpretation can be evolved by any canon of construction; nor can it be supported by reason *or by reference to the history of the State.* On the contrary, the statute on its face, is leveled against 'any person who, with intent to injure or defraud his employer,' etc. There is absolutely no qualification as to the persons made amenable to the statute, by reference to race, color or condition, nor is there the remotest hint at such a limitation. * * * The burden of the statute falls with equal weight upon all such persons—that is, upon all persons similarly situated—and it is therefore, not class or discriminative legislation in the sense that would render the statute offensive to the Fourteenth Amendment."

This insistence finds support only in the argument of counsel. If it be admitted that the statute would be invalid if it were enforced only against the particular classes mentioned, yet, there is not a particle of evidence in the record to sustain the contention.

The same insistence was made when this case came to this court on habeas corpus. The court then expressly de-

clined to consider the contention, *on account of the meager facts* on which the case came up. "If the principal case had been tried," said Mr. Justice Holmes, "it is imaginable that it might appear that a certain class in the community was mainly affected, and that the usual course of events, including the consequences in case of inability to pay the fines was such that, in view of its operation and intent, the whole statute ought to be held void. * * * It may be questioned whether we ought to assume that the proceeding is under the statute, although it is admitted on all hands. *But if we do assume it, there is nothing as yet* to show that the section of the Code apart from the amendments is bad."

The principal case has now been tried and it was not suggested on the trial that a certain class in the community was mainly affected by the act nor that any peculiar result followed as a consequence of inabiliy to pay the fines inflicted by the statute. In fact the entire case is now in the identical situation in which it came to this court on habeas corpus. And there is nothing in this record to show that the original statute is void.

In the case of Rogers v. Alabama, 192 U. S. 226, this court held that the equal protection of the law was denied where persons of the African race were excluded solely because of their race or color from serving as grand jurors in the criminal prosecution of a person of the African race.

In Soon Hing v. Crowley, 113 U. S. 703, 28 L. 1145, this court considered an ordinance of the city and county of San Francisco which had to do with public laundries. The principal objection to the ordinance on the part of the petitioner was, as pointed out by Mr. Justice Field, "founded upon the supposed hostile motives of the supervisors in passing it," and that learned jurist then said:

> "There is nothing, however, within the language of the ordinance, or in the record of its enactment, which in any respect tends to sustain this allegation. * * *

> The motive of the legislators, considered as the purposes they had in view, will always be presumed to be, to accomplish that which follows as the natural and reasonable effect of their enactments. * * * And in the present case, even if the motives of the supervisors were as alleged, the ordinance would not be thereby changed from a legitimate police regulation, *unless in its enforcement it is made to operate only against the class mentioned; and of this there is no pretense.*"

And see to the same effect Tinsley v. Anderson, 171 U. S. 101, 43 L. 91.

In the Rogers case, the court reversed the judgment of conviction because, in the enforcement of the jury law, persons of the African race were excluded from serving as grand jurors; and in the Crowley case, this court declined to reverse the judgment, because it did not appear that in the enforcement of the ordinance it was made to operate only against the Chinese race. In the condition of this record, therefore, the contention may be passed without further discussion. It is true, the record shows that plaintiff in error is of the negro race, and so in the Soon Hing case, plaintiff in error was a Chinese; but this coincidence is of no value in the absence of proof that in its enforcement the law was made to operate only against the classes mentioned. On the face of the statute, the clerk in the store or other mercantile business is as much within its terms as the farm laborer, and there is in the statute no discrimination made as to race or color. If such discrimination existed, or exists today in Alabama, the diligent counsel for plaintiff in error have not seen fit to present it to the lower court in any way, and it is manifestly unfair to insist now that it is true. Indeed, the only possible field of operation for this suggestion would be to engender a prejudice against the statute. The declaration of the Alabama Supreme Court in the case at bar, that this contention cannot be "supported by reason or *by reference to the history of the state*," should com-

pletely answer this suggestion. (American Steel & Wire Co. v. Speed, 192 U. S. 500, 523.)

Moreover, as said by Mr. Justice Harlan in Powell v. Pennsylvania, 127 U. S. 678, "And as it does not appear upon the face of the statute, or from any facts of which this court must take judicial cognizance that it infringes rights secured by the fundamental law, the legislative determination of those questions is conclusive upon the courts. It is not a part of their functions to conduct investigations of facts entering into questions of public policy merely, and to sustain or frustrate the legislative will, embodied in statutes, as they may happen to approve or disapprove its determination of such questions."

It could never have been the purpose of the 14th Amendment to require the Legislature to enact a statute punishing every conceivable offense and the fact that no law exists on the point suggested by counsel, namely, against the employer who obtains service with the fraudulent purpose not to pay for the same, is no argument against the validity of the present law. It is of no more value than an analogy that might be drawn from the failure of the Legislature to define and punish any other offense that might be conceived of.

There is in Alabama a statute enacted under the title, "For the protection of landlords, proprietors or keepers of hotels and boarding houses," and punishes anyone who by fraud or misrepresentation obtains board or lodging. Construing this statute, our court has said that "it is no more of a special privilege to the hotel keeper, than the statute against burglary from a store or dwelling, is to the merchant who owns the store, or the owner of the dwelling." Ex parte King, 102 Ala. 182. Statutes on this subject were upheld in re Milecke, ___ Wash. ___; 100 Pac. 743; State v. Yardley, 95 Tenn. 546; Hutcheson v. Davis, 58 Ill. App. 358; State v. Eagle, 156 Ind. 339.

DUE PROCESS OF LAW.

It is contended that the act in question violates the Fourteenth Amendment in that it deprives Bailey of his liberty without due process of law on account of the amendment of 1903 which established the prima facie rule of evidence. But, we do not see how this contention can be worked out on any theory consistent with the construction which this court has long ago affixed to the due process clause of this amendment.

The case of Twining v. New Jersey, 211 U. S. 77, contains one of the most elaborate discussions of this question to be found within the recent decisions of this court. It is important to note the facts of that case and the conclusion of the court thereon. The trial court instructed the jury that they might draw an unfavorable inference against the defendants from their failure to testify where it was within their power, in denial of the evidence which tended to incriminate them. It was contended that the defendant in this manner was forced to give evidence against himself; and that the due process clause of the Fourteenth Amendment exempted him from such self incrimination in the courts of the State. But in a thorough discussion of the question the court reached the conclusion that such practice did not violate the Fourteenth Amendment. "Due process," said Mr. Justice Moody, "requires that the court which assumes to determine the rights of parties shall have jurisdiction * * * and that there shall be notice and opportunity for hearing given the parties. * * * Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all State laws, statutory or judicially declared, *regulating procedure, evidence*, and methods of trial, and held them to be consistent with due process of law, (citing many cases) * * *

"Among the most notable of these decisions are those sustaining the denial of jury trial both in civil and criminal cases, the substitution of informations for indict-

ments by a grand jury, the enactment that the possession of policy slips raises a presumption of illegality, and the admission of the deposition of an absent witness in a criminal case. The cases proceed upon the theory that, given a court of justice which has jurisdiction, and acts, not arbitrarily, but in conformity with a general law, upon evidence, and after inquiry made with notice to the parties affected and opportunity to be heard, then all the requirements of due process so far as it relates to procedure in court and methods of trial and character and effect of evidence are complied with."

It seems to us that this holding of the court determines the validity of this rule of evidence. The court had jurisdiction by reason of the fact that the statute declared a criminal offense; it acted not arbitrarily but in conformity with the general law under which all others likewise situated were tried; the evidence was offered before the jury and an inquiry made into the guilt of the defendant. Notice was given to the defendant and an opportunity afforded him to be heard; and the mere procedure *and the effect of the evidence* offered are matters of local concern. If a defendant may be required to incriminate himself as was held by the New Jersey Court, without any violation of the Fourteenth Amendment, this court cannot it seems to us, consistently with the reasoning of that opinion, hold the present rule of evidence bad.

"The power of the people of the states," said Mr. Justice Moody in Twining v. New Jersey, supra, "to make and alter their laws at pleasure is the greatest security for liberty and justice this court has said,"

In the case of Dent v. West Virginia, 129 U. S. 128, Mr. Justice Field defined "due process of law" as follows:

> "They (the terms, due process of law) come to us from the law of England, from which country our jurisprudence is to a great extent derived, and their requirement was there designed to secure the subject against the arbitrary action of the Crown and place him under the protection of the law. They were

> deemed to be equivalent to 'the law of the land.' In this country, the requirement is intended to have a similar effect against the legislative power, that is, to secure the citizen against any arbitrary deprivation of his rights, whether relating to his life, his liberty, or his property. Legislation must necessarily vary with the different objects upon which it is designated to operate. It is sufficient, for the purpose of this case, to say that legislation is not open to the charge of depriving one of his rights without due process of law, *if it be general in its operation upon the subjects to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters, that is, by process or proceedings adapted to the nature of the case.* The great purpose of the requirement is to exclude everything that is arbitrary and capricious in legislation affecting the rights of the citizen."

And in Leeper v. Texas, 139 U. S. 462, 35 L. 225, Mr. Chief Justice Fuller said with reference to the power of the State in dealing with crime:

> "That by the Fourteenth Amendment the powers of States in dealing with crime within their borders are not limited, except that no State can deprive particular persons, or classes of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State, the constitutional requirement is satisfied; *and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice."*

POWER TO ESTABLISH PRIMA FACIE RULE OF EVIDENCE.

We think it may be stated as a general proposition of law that the right of the Legislature to establish a prima facie rule of evidence in criminal cases has been recognized by every court, state and federal, in which the question has been presented, and among such cases we cite the following:

Li Sing v. United States, 180 U. S. 485, 45 L. 634;
Adams v. N. Y., 192 U. S. 585, 48 L. 515;
Ah How v. United States, 193 U. S. 65; 48 L. 619;
Fong v. United States, 149 U. S. 697, 719, 37 L. 905, 918;
Commonweath v. Williams, 6 Gray (Mass.) 1;
State v. Beach, 147 Ind. 74;
State v. Buck, 120 Mo. 479, 25 S. W. 573;
State v. Kingsley, 108 Mo. 135, 18 S. W. 994;
Meadowcraft v. People, 163 Ill. 56;
Barker v. State, 54 Wisc. 368;
Robertson v. People, 20 Colo. 279;
Voght v. State, 124 Ind. 358;
People v. Cannon, 139 N. Y. 32;
Board of Commissioners v. Merchant, 105 N. Y. 148;
Re Milecke, (Wash.) 100 Pac. 743.

The validity of this provision of the statute has been considered and upheld in three different cases by the Supreme Court of Alabama:

Bailey v. State, 158 Ala. 18.
State v. Vann, 150 Ala. 66;
State v. Thomas, 144 Ala. 77;
Bailey v. State, 158 Ala. 18.

The question was first presented in State v. Thomas, 144 Ala. 77, supra, and the Court sustained the power of the Legislature to declare a prima facie rule of evidence, using this language:

> "The Amendment of Section 4730, which section simply declares the intent, declares a prima facie rule of evidence in such cases. In 8 Cyc. 820, it is said, 'The Legislature has the power to give greater effect to evidence than it possesses at common law, and in both civil and criminal proceedings it may declare what shall be prima facie evidence. On the other hand, it cannot prescribe what shall be conclusive evidence as this would be an invasion of the province of the judiciary.' This seems to be a rule of well-nigh, if not universal recognition." Citing State v. Beach, 147 Ind. 743, 6 L. R. A. 179; Meadowcraft v. People, 163 Ill. 56, 67; Fong. v. United States, 149 U. S. 697, 759; 37 L. 905.

And again in State v. Vann, 150 Ala. 66, supra, the court held the statute good as against this attack, in this language:

> "The amendment is a mere rule of evidence and has been upheld by this court in the case of State v. Thomas, 40 South. 271, 144 Ala. 77, 2 L. R. A. (N. S.) 1011, the soundness of which is not challenged by counsel."

In Bailey v. State, 158 Ala. 18, the court, in a well considered opinion by Judge Denson, again expressly re-affirmed the former cases and cited, among other authorities, Banks v. State (Ga.), 52 S. E. 74, 2 L. R. A. (N. S.) 1007.

In Banks v. State, supra, the Supreme Court of Georgia considered a statute having the same object as the

Alabama statute under consideration, and upheld that feature, declaring the presumption which should follow from certain facts. In that case the statute provided that proof of the contract of hiring, the procuring thereon of money or other things of value, the failure to perform the service so contracted for or to return the money so advanced with interest thereon to the time the labor was to be performed, without good and sufficient cause, and loss or damage to the hirer, should be presumptive evidence of the fraudulent intent. After reviewing the cases, the Court said:

> "This is not an assumption of judicial functions by the Legislature. It declares a rule of evidence under which certain acts are deemed presumptive evidence of a fraudulent intent in committing them. The Legislature has the power to establish rules of evidence. * * * The power of the Legislature on this subject is not so extensive in regard to criminal cases as in regard to those of a civil character. Thus, to illustrate, in the former the accused must be confronted with the witnesses. But the power to make rules of evidence, where not conflicting with any constitutional provision or right, exists in respect to both classes of cases."

In Fong v. United States, 149 U. S. 697, 729, supra, this Court considered the Act of May 5th, 1892, being an act to prohibit the coming of Chinese persons into the United States. The Act provided that Chinese laborers then in the United States and who were entitled to remain, should, within six months after the passage of the act, obtain a certain certificate; and that if any such laborer neglected, failed or refused to comply with the act, and be found within the jurisdiction of the United States after the time named without such certificate, he should

be deemed and adjudged to be unlawfully within the United States, *unless he should establish clearly to the satisfaction of the judge* "that by reason of accident, sickness or other unavoidable cause he had been unable to procure his certificate, and to the satisfaction of said United States Judge and by at least one credible witness other than Chinese, that he was a resident of the United States on the 5th day of May, eighteen hundred and ninety two." The Court said with respect to this feature of the law:

> "The provision which puts the burden of proof upon him of rebutting the presumption arising from his having no certificate as well as the requirement of proof by at least one credible white witness, that he was a resident of the United States at the time of the passage of this Act, *is within the acknowledged power of every Legislature to prescribe the evidence which shall be received, and the effect of the evidence in the courts of its own government.*"

In Li Sing v. United States, 180 U. S. 485, supra, this Court, speaking through Mr. Justice Shiras, again upheld this feature of the law quoting the language of the Court in Fong's case.

In Adams v. N. Y., 192 U. S. 585, supra, the Court considered a statute of New York which made the possession of the record of chances or slips in the game of policy or the possession of any paper, print, or writing commonly used in playing or promoting that game, prima facie evidence of "possession thereof knowingly," in violation of the Statute. Mr. Justice Day, speaking for the Court, said:

> "Innocent persons would have no trouble in explaining the possession of these tickets, and in any event the possession is only prima facie evidence and

> the party is permitted to produce such testimony as will show the truth concerning the possession of the slips. *Furthermore, it is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government.*"

In the case of Commonwealth v. Williams, 6 Gray (Mass.) 1, supra, the Court held valid a statute which declared that the delivery of spirituous liquors in any place other than a dwelling house should be deemed prima facie evidence of a sale. The Court said:

> "The statute only prescribes, to a certain extent, and under particular circumstances, what legal effect shall be given to a particular species of evidence, *if it stands entirely alone and is left wholly unexplained.* This neither conclusively determines the guilt or innocence of the party who is accused, nor withdraws from the jury the right and duty of passing upon and determining the issue to be tried. The burden of proof remains continually upon the government to establish the accusation which it makes. * * * The only purpose and effect of the particular clause of the statute objected to are, *to give a certain degree of artificial force to a designated fact, until such explanations are afforded* as to show that it is at least doubtful whether the proposed statutory effect ought to be attributed to it; but the fact itself is still to be shown and established by proof sufficient to convince and satisfy the minds of the jurors."

Mr. Justice Thomas dissented in this case and his opinion contains all that can be said against the validity of this kind of legislation. Among other things, he argued with some vigor that the delivery of liquor was an act perfectly innocent,—being an element alike of a gift, bail-

ment and sale. But the court sustained the prima facie presumption which the Legislature sought to give to such act of delivery.

In Board of Commissioners v. Merchant, 103 N. Y. 143, supra, the Court considered and upheld a statute which required an applicant for a liquor license to execute a bond conditioned that he would not sell liquors to be drunk on his premises and that when any person was seen to drink on his premises that fact should be prima facie evidence that the same were sold with the intent that they should be drunk thereon. It was contended by counsel for appellant that the last mentioned provision of the statute violated the constitutional guaranties of due process of law and trial by jury. In a well considered opinion, the court touched upon the power of the Legislature to declare a prima facie rule of evidence and stated the limitations on such power. We quote the same in part:

> "The general power of the Legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party and thus deny him the opportunity for a trial would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime over which the party charged had no control and with which he had no connection, or which made that prima facie evidence of crime which had no relation to a criminal act and no tendency by itself to prove a criminal act. *But so long as the Legislature, in prescribing rules of evidence in either civil or criminal cases, leaves a party a fair opportunity to make his defense and to submit all the facts to the jury to be weighed by them, upon evidence legiti-*

mately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds."

In People v. Cannon, 139 N. Y. 32, supra, the court considered an act to protect owners of bottles. The act provided that such owners should file a description of the name, marks or devices used on the bottles and that after such filing it should be unlawful for any person than the owner to use any such bottle; that the possession thereof, without the written consent of the owner, should be presumptive evidence of the unlawful use, purchase and traffic in and of such bottles. The court sustained the power of the Legislature to declare that the facts mentioned when proven should be prima facie evidence of a violation of the act, in an elaborate opinion by Judge Peckham, afterwards Mr. Justice Peckham of this Court. We have been unable to find any case in which the limitations on this power are more accurately or clearly stated, than in the opinion of Judge Peckham, and we quote the same in part:

> "It cannot be disputed that the courts of this and other states are committed to the general principle that even in criminal prosecutions the Legislature may with some limitations enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. (See cases cited in 103 N. Y., *supra.*) The limitations are that the fact upon which the presumption is to rest must have some fair relation to the main fact because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural or extraordinary, and the accused must have in each case a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it

> has weighed all the evidence and given such weight to the presumption as to it shall seem proper. A provision of this kind does not take away or impair the right of trial by jury. It does not in reality and finally change the burden of proof. The people must at all times sustain the burden of proving the guilt of the accused beyond a reasonable doubt. It, in substance, enacts that certain facts being proved, the jury may regard them, if believed, as sufficient to convict, in the absence of explanation or contradiction. Even in that case, the court could not legally direct a conviction. It cannot do so in any criminal case. That is solely for the jury and it would have the right, after a survey of the whole case, to refuse to convict unless satisfied beyond a reasonable doubt of the guilt of the accused, even though the statutory prima facie evidence were uncontradicted."

In State v. Beach, 147 Ind. 74, supra, the court considdered a statute which provided that the failure of a banker within thirty days after receiving a deposit, should be prima facie evidence on the part of the banker of an intent to defraud at the time of receiving the deposit. The court said, at p. 83:

> "The statute enables the State to make prima facie proof of the intent to defraud by showing the failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank, as the case may be, within thirty days after the deposit was received."

In an elaborate opinion the court considered the question, citing and quoting from many cases and held the statute to be valid.

In the case of State v. Buck, 120 Mo. 479, 25 S. W. 573; State v. Satterly, 131 Mo. 464; Robinson v. People,

20 Colo. 279; Meadowcraft v. People, 153 Ill. 56; Barker v. State, 54 Wis. 368, the several courts considered banking statutes in terms almost identical with that held good in State v. Beach, supra, and in every instance the same were sustained.

In the case of State v. Kingsley, 108 Mo. 135, supra, the court considered a statute which provided that every person who should obtain board or lodging by means of any trick or deception or false or fraudulent representation and should fail or refuse to pay therefor should be held to have obtained the same with intent to cheat or defraud and that proof of the facts mentioned should be prima facie evidence of the intent.

From this review of the authorities, the general rule seems to be that the Legislature may establish a prima facie rule of evidence and the only limitation on this right to do so is laid down in the case of Board of Commissioners v. Merchant, 103 N. Y. 143, supra.

In the case at bar, every fact and condition which enters into the crime, except the intent, must be proven by the State before the rule of evidence obtains and the presumption of guilt follows. In every case cited and quoted from above, the question of fraud or criminal intent was involved, and under the rules established by the several statutes there considered, such intent was required to follow from certain facts. We will consider briefly in this light the cases involving the banking statutes. Here it is merely the failure of a bank within thirty days after receiving a deposit, which so many of the courts have held will sustain a prima facie rule of evidence from which guilt follows. Considered in and of itself, the failure of a bank within thirty days after receiving a deposit, does not constitute a fraud. In the absence of the rule of evidence established, the State could not succeed in a conviction by merely proving those facts. And so with the case of Commonwealth v. Williams, supra. The mere

fact of delivering the liquors is an innocent act. It is entirely consistent with a gift or a bailment, and yet in one of the best considered opinions to be found on this subject, the Supreme Court of Massachusetts upholds the law. If we consider the case of People v. Commonwealth, supra, we have the same conditions. Here was an act to protect owners of bottles, and the mere possession of a marked bottle was held to constitute prima facie evidence of the guilt of the possessor. The person in possession may have found the bottle, or acquired it in many other ways not inhibited by the statute and yet the New York Court held the statute good against this attack. The case of Commissioners v. Merchant, supra, involved facts as far reaching as any case and yet the rule was sustained by the New York Court. The mere fact that a person was seen to drink on the premises was the fact that made the owner of the premises prima facie guilty.

INABILITY OF DEFENDANT TO PROVE MENTAL STATUS.

It is insisted by counsel for plaintiff in error with apparent seriousness that by reason of the fact that Bailey could not testify to his uncommunicated motive or intention he was, therefore, unable to prove his innocence. Turning to the record we find that the only evidence introduced was that of Borden, the manager of the company, alleged to have been defrauded by Bailey. The defendant rested his case at the conclusion of Borden's testimony and did not offer to testify to his uncommunicated motive or intention, nor did he offer any testimony of any nature in defense of the charge brought against him. Under the laws of Alabama a defendant is a competent witness in his own behalf. (Code of 1907, sec. 7894). Not having offered to testify to his own uncommunicated motive or intention, it is illogical to say that he was injur-

ed by this rule which counsel invoke in his behalf. For aught that appears it may have been Bailey's intention when he entered upon the employment to thereby obtain the money with the fraudulent purpose of not rendering the service (Powell v. Pa., 127 U. S. 678). The present argument of counsel is upon the idea that Bailey would have testified that his intention was not to obtain the money under alleged false pretense; but not having offered to testify this is merely a moot question. *He voluntarily rested his case when the State's witness testified. The State could not force him to give evidence against himself. He had the right to testify under the laws of Alabama, or to refuse to do so, at his own election.* But, as suggested by Judge Denson, "* * * The conclusion of counsel from their stated premises, it seems to us is a *non sequitur.* Because a person may not testify, in so many words, that he did not intend a certain result, or that his motive was not to defraud, by no means cuts him off from proving such a negative by the circumstances attending his utterances, which may give point or color to the same or supply the true intent or motive. And so the accused is not excluded from giving testimony, from offering evidence, from being heard, nor from setting up any lawful defense."

But, assuming that there are no witnesses by whom the making or recission of the contract may be proven, the defendant loses sight of the fact that he is a competent witness in his own behalf and that the jury are the judges of credibility of the evidence as between himself and other witnesses. He has every right and guarantee under the law that any other defendant in any criminal case could have. Furthermore, the plaintiff in error confuses the facts of a particular case with a general principle. If the principles on which this case must rest are well founded, it is wholly immaterial what the effect may be in a particular case. The courts cannot look to such

a condition as that nor can principles be upset for the benefit of mere individuals. To permit it to be done would bring about the very condition which the plaintiff in error is suggesting in this case, namely, that he is deprived of the equal protection of the law; not on his own part but on the part of those who would be less favored. The law is not responsible for his inability to prove his innocence by independent evidence.

It is argued that the rule of evidence which excludes the defendant from testifying as to his motives, has the effect of making the rule of evidence prescribed by the statute, a conclusive rule. But if it is in effect a conclusive rule in the case at bar, it is due to the particular facts and not to the statute itself.

Nor can we see the relevancy in this connection of the defendant's contention that by reason of the rule of decision in Alabama preventing him from testifying to his secret and uncommunicated motive and intention, he was deprived of his life or liberty without due process of law. If the effect of this rule is to deprive the plaintiff in error of his liberty without due process of law, *it must likewise have the same effect in any other prosecution.* A case might be assumed wherein the defendant, under indictment for murder by an accidental shooting was the sole witness in his own behalf and yet, under the rule referred to, he would be excluded from testifying to his secret intention. This fact, however, could not destroy the rule which would so prevent his testifying nor could it affect the statute under which he was indicted.

Moreover, if there are no witnesses to the making and recission of the contract, and if the defendant by reason of the rule of decision referred to, cannot overcome the prima facie case made by the State, it does not follow that every subsequent case that may come under the law will be thus affected and the court could not on these facts hold the law invalid.

Adverting again to the statute under consideration, as we have before pointed out, three conditions of fact must be proven before the prima facie rule of evidence is set in operation, namely, a written contract to perform labor, the obtaining of money on the faith of the contract and the refusal by the defendant, without just cause and without refunding the money, to perform the service. Abstractly speaking, is it far fetched to say that from these facts a prima facie presumption of fraud may arise? They are certainly stronger in their effect than the facts on which many of the cases referred to above are based. This rule of evidence does not shut out the testimony of the defendant. He has the opportunity of testifying for himself at and through a trial held in the usual mode. In prescribing the present rule of evidence, the Legislature has left a full and fair opportunity to the defendant to make his defense and submit all the facts to the jury to be weighed by them.

As is well pointed out in 24 Cyc. 192, a prima facie rule of evidence in a criminal case "does not overcome the presumption of innocence or change the burden of proof or require the jury to convict, unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt." The present statute comes directly within this principle of law on which reliance is placed by plaintiff in error. Proof of the constituent facts of the offense merely calls upon the defendant to explain these facts. Has the Legislature *in any case* the right to say that certain facts shall constitute a crime? If so, it may declare the constituent facts of the crime which shall be prima facie evidence of the criminal intent.

It cannot be truly contended that under the law the defendant had no control over the facts which are the basis of the offense, or that he had no connection with such facts, for the reverse of those conditions is patent on the

record; nor can it in truth be said that several conditions of fact, which the State must first prove, had no relation to a criminal intent. *The statute was designed to punish fraud in entering into a contract of employment and thereby obtaining money.* The facts referred to constitute the offense except the element of fraudulent intent which must follow from the facts. If the offense can exist at all such facts not only have relation to the intent but are immediately connected with it.

Nor does the presumption of innocence attend a defendant throughout the whole trial but only "*until sufficient evidence is introduced to overcome the proof which the law has created.*" Coffin vs. United States, 156 U. S. 453.

Moreover, whether the facts are consistent with innocence, is a conclusion for the jury to draw; and they may, notwithstanding the present rule of evidence, find the defendant not guilty. It is the duty of the jury to consider all the evidence in the case, and to find the defendant not guilty if a reasonable doubt arises out of any part of the evidence. As said by Chief Justice Stone, in Hurd v. State, 94 Ala. 100, "It is certainly the duty of the jury in pronouncing on issues submitted to them, to consider and weigh all the testimony in the case. * * *The jury would be derelict, if a segregated part of the testimony were made the basis of a verdict, without at least considering what influence should be accorded to other testimony in the cause. * * *And this rule applies in all issues submitted for decision, without reference to the parties, their pursuits, race or condition in life; for all have equal rights before the law."

And as said by Judge Denson in the case at bar, "It must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the as-

cused beyond a reasonable doubt or not. On the contrary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence."

Under an indictment for larceny, certain presumptions arise against the defendant from the recent possession of stolen goods. As said by Judge Brickell, in Martin v. State, 104 Ala. 78, "It is the settled law of this State, that the recent possession of stolen goods, imposes on the possessor the onus of explaining the possession; and, if he fails to make a reasonable explanation, raises a presumption of guilt, which will support a verdict of guilty." To the same effect see, Wilson v. United States, 162 U. S. 613; Considine v. United States, 112 Fed. 342.

At the same time, our Court recognizes the doctrine of the presumption of innocence. See Newson v. State, 107 Ala. 133, 139.

A rule of evidence, whether established by statute or decisions, is entirely consistent with that presumption.

The refusal or failure to perform the act or service is by the statute made prima facie evidence of the intent to injure or defraud the employer. The question may be suggested, what intent to defraud is here referred to? The answer will be found in the opening clause of the statute, namely, the intent to defraud at the time of entering into the contract; and the further and like intent which must exist at the time of the refusal or failure to perform. The offense would have been complete without any reference to the intent that might exist at the time of the failure or refusal to perform. The Legislature has gone further than was necessary in declaring the offense.

The entire contention of a class discrimination "calls on this court to disregard the interpretation given to a state statute by the court of last resort of the State, and, by an adverse construction, to decide that the state law is repugnant to the Constitution of the United States. 'But the elementary rule is that this Court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.'" Tullis v. Lake Erie & W. R. Co., 175 U. S. 348, 353; American Steel & Wire Co. v. Speed, 192 U. S. 523.

STATUTE SEPARABLE.

While we are confident that the statute is valid in its entirety, and that the rule of evidence should be upheld, yet if the court should be of opinion that the statute as originally passed was valid, and that the rule of evidence is an improper exercise of legislative power, then we insist that the original statute would remain in force.

> "It is an elementary principle," this court has said, "that the same statute may be in part constitutional and in part unconstitutional, and if the parts are wholly independent of each other, that which is constitutional may stand, while that which is unconstitutional will be rejected."

Field v. Clark, 143 U. S. 649.
Allen v. Louisiana, 103 U. S. 80, 83.
Baldwin v. Franks, 120 U. S. 678.
Kimmish v. Ball, 129 U. S. 217.
Noble v. Mitchell, 164 U. S. 367.

"The amendments are separable," said Mr. Justice Holmes on the former writ of error, "as is sufficiently shown by the fact that the rest of the enactment originally stood without them."

Bailey v. Alabama, 211 U. S. 453.

STATUTE NOT VOID FOR UNCERTAINTY.

The statutory words, "without just cause," are clear and definite. They refer to the refusal or failure to perform the service. It is left to the court or the jury in each case to determine the justness of the cause for quitting. Under some conditions the court might decide the question as a matter of law; while again the duty might be left to the jury. This Court has construed the words "just compensation" as used in the Fifth Amendment, to "be a full and perfect equivalent for the property taken," and Mr. Justice Brewer said that the language of the amendment in this respect was "happily chosen." Monongahela Navagation Co. v. United States, 148 U. S. 310, 325-6. And so in the present case, the words "without just cause" will leave the question to be reviewed by the courts; and the language is in our judgment "happily chosen."

But this is a question entirely of the construction of the statute, and in no possible way can it involve a Federal question. The point having been made before and decided by the Alabama Supreme Court adversely to the plaintiff in error, that holding is conclusive upon this court.

Noble v. Mitchell, 164 U. S. 367.

We respectfully insist that the statute is constitutional and should be upheld.

ALEXANDER M. GARBER,
Attorney General of Alabama.

THOMAS W. MARTIN,
Assistant Attorney General of Alabama.

OPINION

BAILEY *v.* STATE OF ALABAMA.

ERROR TO THE SUPREME COURT OF THE STATE OF ALABAMA.

No. 300. Argued October 20, 21, 1910.—Decided January 3, 1911.

Prima facie evidence is sufficient to outweigh the presumption of innocence, and, if not met by opposing evidence, to support a verdict. *Kelly* v. *Jackson*, 6 Pet. 632.

The validity of a statute that authorizes a jury to convict on *prima facie* evidence must be judged by the fact that the jury may convict even if it is not made the duty of the jury to do so.

Although a state statute in terms be to punish fraud, if its natural and inevitable purpose is to punish for crime for failing to perform contracts of labor, thus compelling such performance, it violates the Thirteenth Amendment and is unconstitutional.

A constitutional prohibition cannot be transgressed indirectly by creating a statutory presumption any more than by direct enactment; and a State cannot compel involuntary servitude in carrying out contracts of personal service by creating a presumption that the person committing the breach is guilty of intent to defraud merely because he fails to perform the contract.

While States may, without denying due process of law, enact that proof of one fact shall be *prima facie* evidence of the main fact in issue, the inference must not be purely arbitrary; there must be rational relation between the two facts, and the accused must have proper opportunity to submit all the facts bearing on the issue.

While its immediate concern was African slavery, the Thirteenth Amendment was a charter of universal civil freedom for all persons of whatever race, color, or estate, under the flag.

The words "involuntary servitude" have a larger meaning than slavery, and the Thirteenth Amendment prohibited all control by coercion of the personal service of one man for the benefit of another.

While the Thirteenth Amendment is self-executing, Congress has power to secure its complete enforcement by appropriate legislation and the peonage act of March 2, 1867, and §§ 1990 and 5526, Rev. Stat., are valid exercises of this authority. *Clyatt* v. *United States*, 197 U. S. 207.

A peon is one who is compelled to work for his creditor until his debt

is paid, and the fact that he contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the peonage acts.

The Federal anti-peonage acts are necessarily violated by any state legislation which seeks to compel service or labor by making it a crime to fail or refuse to perform it.

Although this court may not impute to a State an actual motive to oppress by a statute which that State enacts, it must consider the natural operation of such statute and strike it down if it becomes an instrument of coercion forbidden by the Federal Constitution.

Section 4730 of the Code of Alabama as amended in 1907, in so far as it makes the refusal or failure to perform labor contracted for without refunding the money or paying for property received *prima facie* evidence of the commission of the crime defined by such section, and when read in connection with the rule of evidence of that State, that the accused cannot testify in regard to uncommunicated motives, is unconstitutional as in conflict with the Thirteenth Amendment and of the legislation authorized by it and enacted by Congress.

Quære, and not necessary now to decide, whether such section is, under the Fourteenth Amendment, an unconstitutional deprivation of property without due process of law or denial of equal protection of the laws.

161 Alabama, 78, reversed.

THE facts, which involve the constitutionality of § 4730 of the Code of Alabama as construed by the courts of that State and the validity of a conviction thereunder, are stated in the opinion.

Mr. Fred S. Ball, *Mr. Edward S. Watts* and *Mr. Daniel W. Troy* for plaintiff in error, submitted.

Mr. Assistant Attorney General Harr, with whom *The Attorney General* was on the brief, by leave of the court, on behalf of the United States as *amicus curiæ:*

The judgment, and the statute upon which it is based, conflict with the Thirteenth Amendment and §§ 1990, 5526, Rev. Stat. See *Clyatt* v. *United States*, 197 U. S.

207, 216, which settled the question, left in doubt by *Robertson* v. *Baldwin*, 165 U. S. 275, 280. A state penal statute will be construed by this court as though a rule of evidence announced by the highest court of the State as being applicable thereto was incorporated therein. Freund, Police Power, § 448.

The act, as amended, is the result of efforts to enforce labor contracts. See act of March 1, 1901, declared unconstitutional by the Supreme Court of Alabama, *Toney* v. *The State*, 141 Alabama, 120; and by the Federal court, *Peonage Cases*, 123 Fed. Rep. 671, 691.

That act failing, resort was had to the statute here in question. But first the statute, found ineffective under *Ex parte Riley*, 94 Alabama, 82, upon the subject of intent, was amended by adding the *prima facie* clause. *Bailey* v. *The State*, 158 Alabama, 18, 24.

The statute was further amended by the act of August 15, 1907 (Gen. Act, Ala., 1907, p. 636), so as to cover expressly tenants of land, and by changing the penalty so as to make it peculiarly applicable to contracts with agricultural laborers. For history of this legislation and the position of the Supreme Court of Alabama in regard thereto, see *Bailey* v. *State*, 158 Alabama, 18, 22; *Banks* v. *State*, 124 Georgia, 15; *State* v. *Thomas*, 144 Alabama, 77; *Vann's Case*, 150 Alabama, 66.

Even if the legislature can punish fraudulent practices in obtaining property by false pretenses under contract for the performance of an act or service, such object is clearly distinguishable from one punishing a mere breach of contract. *Freeman* v. *United States*, 217 U. S. 539. In whatever language a statute may be framed, its purpose must be determined by its natural and reasonable effect. *Henderson* v. *Mayor of New York*, 92 U. S. 268.

In Florida and Mississippi, similar statutes have been declared void under the Thirteenth Amendment by United States judges in charges to grand juries; and see

also a similar holding in North Carolina. So also as to the Louisiana act of July 5, 1892, *State* v. *Murray*, 116 Louisiana, 655, though it is manifest that it punishes a mere breach of contract. See records in this court this term in *Harlan* and *Gallagher* v. *McGourin*, 218 U. S. 442.

In construing the Alabama statute the court will bear in mind that the legislature would naturally seek to accomplish by indirection what it could not do directly. But § 1990, Rev. Stat. specifically covers such a case. *Freeman* v. *United States*, 217 U. S. 539, distinguished.

A breach of a contract for personal service upon which advances have been received cannot be made *prima facie* evidence of a fraudulent intent in entering into the contract. *Ex parte Riley*, 94 Alabama, 82; *State* v. *Williams*, 63 S. E. Rep. 949; *Ex parte Hollman*, 79 S. E. Rep. 9; *Vankirk* v. *Staats*, 24 N. J. L. 121; *Adams* v. *New York*, 192 U. S. 585; *Commonwealth* v. *Williams*, 6 Gray (Mass.), 1. *State* v. *Kingsley*, 108 Missouri, 135, holds that it is necessary to establish fraudulent intent before the *prima facie* rule in this statute becomes operative, and see *State* v. *Yardley*, 95 Tennessee, 546, to same effect, that where the only thing shown was a refusal to pay, the fraudulent intent must be proved before the *prima facie* rule could become operative. In this case mere breach of contract is made evidence of the fraudulent intent.

The *prima facie* rule established by the Alabama statute, as shown by this case, is unyielding. The inference under that statute of an intent to defraud from a mere breach of the contract is as absolute when the breach occurs eleven months thereafter as when it occurs one day after the making of the contract.

The judgment in this case, and the statute of Alabama upon which it is founded, are in violation of the Fourteenth Amendment. They deny the defendant the equal protection of the laws. The statute hits especially, as was intended, negro laborers on farms and plantations. Every

reported case under the statute is that of a farm laborer. The maximum penalty fixed by the statute, $300, also makes it peculiarly applicable to this class of laborers. See *Ex parte Drayton*, 153 Fed. Rep. 986, holding unconstitutional on those grounds a similar statute of South Carolina.

Even if the Alabama statute, as originally enacted, was not to be regarded as class legislation, the subsequent amendments render it so, and the actual enforcement of the statute against a single class of laborers alone, denies equal protection. *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 558; *Gulf, Colorado & Santa Fe Ry. Co.* v. *Ellis*, 165 U. S. 151.

Even if the employers of such labor have much to complain of, it does not relieve the statute of the taint of unconstitutionality. See Judge Jones' charge to grand jury in the *Peonage Cases*, 123 Fed. Rep. 691.

Although the legislature may provide that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact, the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. *People* v. *Cannon*, 139 N. Y. 32, 43; *State* v. *Beswick*, 13 R. I. 211.

A law which practically shuts out the evidence of a party, thus denying him the opportunity for a trial, substantially deprives him of due process of law. *Commissioners* v. *Merchant*, 103 N. Y. 143, 148; *Commonwealth* v. *Rubin*, 165 Massachusetts, 453; *Kelly* v. *Jackson*, 6 Pet. 622, 631; Greenleaf on Evidence, § 33; *Vankirk* v. *Staats*, 24 N. J. L. 121; *Steinhardt* v. *Beir*, 60 N. Y. Super. Ct. Rep. 489; *Mooney* v. *LaFollette*, 21 N. Y. App. Div. 510; *McCormick* v. *Joseph*, 77 Alabama, 236, 240; *Coffin* v. *United States*, 156 U. S. 432, 453; *State* v. *Thomas*, 144 Alabama, 77, and see *Twining* v. *New Jersey*, 211 U. S. 78, 101, as to the guaranties of due process of law.

Mr. Alexander M. Garber, Attorney General of the State of Alabama, and *Thomas W. Martin* for defendant in error:

The statute was designed to punish a certain class of frauds not then punished by any statute.

The original and amended statute has been frequently construed by the Supreme Court of Alabama and the court has consistently held that the purpose of the statute was to punish fraudulent practices and not the mere failure to pay a debt.

The offense is but a species of the common-law crime of cheating by false pretenses, and if in fact the statute does define and punish a crime, there can be no question here of its validity. See for history of the legislation, *Riley* v. *State*, 94 Alabama, 82; *Toney* v. *State*, 141 Alabama, 120; *Peonage Cases*, 123 Fed. Rep. 671, 690, and *Ex parte Drayton*, 153 Fed. Rep. 986, considering a statute of South Carolina.

For decisions involving similar legislation, see *Lamar* v. *State*, 120 Georgia, 312; *State* v. *Williams* (N. C.), 63 S. E. Rep. 949; *Ex parte Hollman*, 79 S. C. 9; *S. C.*, 21 L. R. A. (N. S.) 242. No case can be found from any jurisdiction in which a statute similar to the one under consideration has been held to be invalid.

Unless the original statute is held invalid, there can be no condition of peonage incident to a conviction thereunder. The rule of evidence does not, of itself, or as an amendment to the original statute, make a condition of peonage.

The statute at present is wholly different from the law held invalid in *Toney* v. *State*, 141 Alabama, 120, and in the *Peonage Cases*, 123 Fed. Rep. 671. See *Bailey* v. *State*, 158 Alabama, 18; *State* v. *Vann*, 150 Alabama, 66.

The statute was meant to prevent employés from making fraudulent contracts and to prevent them from obtaining money by promising service. *McIntosh* v. *State*,

117 Alabama, 127. The essential ingredient of the offense is fraud in entering into the contract of employment. If invalid so are all statutes aimed at the obtaining of goods of another by false pretenses. The victim in all such cases has a civil right of action against the party who thus obtains his money. But this fact does not deprive the State of its inherent right to punish the criminal act involved in that transaction.

The Alabama Supreme Court has held that the basal fact is fraud and that the statute does not violate the provision of the state constitution against imprisonment for debt. This construction of the state constitution is conclusive on this court. *Yick Wo* v. *Hopkins*, 118 U. S. 360; *Noble* v. *Mitchell*, 164 U. S. 367. The only question left for determination is whether the statute as thus construed violates the Thirteenth Amendment or the peonage statute. *Mo. Co.* v. *McCann*, 174 U. S. 575; *Am. Steel & Wire Co.* v. *Speed*, 192 U. S. 523. This court cannot hold the law to be violative either of that Amendment, or of the peonage statute except on the theory that it imprisons for a debt. As to what is peonage, see *Clyatt* v. *United States*, 197 U. S. 207; see also *Freeman* v. *United States*, 217 U. S. 539.

The provision of the present statute which provides for a fine in double the damage suffered by the injured party, half to go to the county and the other half to such party, is valid. *Freeman* v. *United States, supra; Re Ebenhack*, 17 Kansas, 615; *Maryland* v. *Nicholson*, 67 Maryland, 1; *State* v. *Yardley*, 95 Tennessee, 546.

The act does not violate the Fourteenth Amendment in that it applies only to persons who enter into contracts for the performance of an act or service or for the rent of land; that it does not bear equally upon the employé and the employer, and that it is applied only against laborers and the colored race. It applies to every person who with a fraudulent purpose enters into a written

contract to perform an act or service for another, and thereby obtains money. *Clark* v. *Kansas City*, 176 U. S. 144.

The legislature may establish a *prima facie* rule of evidence in criminal cases. *Li Sing* v. *United States*, 180 U. S. 485; *Adams* v. *New York*, 192 U. S. 585; *Ah How* v. *United States*, 193 U. S. 65; *Fong* v. *United States*, 149 U. S. 697, 719; *Commonwealth* v. *Williams*, 6 Gray (Mass.), 1; *State* v. *Beach*, 147 Indiana, 74; *State* v. *Buck*, 120 Missouri, 479; *State* v. *Kingsley*, 108 Missouri, 135; *Meadowcraft* v. *People*, 163 Illinois, 56; *Barker* v. *State*, 54 Wisconsin, 368; *Robertson* v. *People*, 20 Colorado, 279; *Voght* v. *State*, 124 Indiana, 358; *People* v. *Cannon*, 139 N. Y. 32; *Commissioners* v. *Merchant*, 105 N. Y. 148; *Re Milecke*, 100 Pac. Rep. 743.

The validity of this provision has been upheld by the Supreme Court of Alabama in *Bailey* v. *State*, 158 Alabama, 18; *State* v. *Vann*, 150 Alabama, 66; *State* v. *Thomas*, 144 Alabama, 77.

The fact that Bailey could not testify to his uncommunicated motive or intention does not prove that he was unable to prove his innocence. If a rule of evidence which excludes the defendant from testifying as to his motives has the effect of making the rule of evidence prescribed by the statute a conclusive rule, it is due to the particular facts and not to the statute itself.

A *prima facie* rule of evidence in a criminal case does not overcome the presumption of innocence or change the burden of proof or require the jury to convict, unless they are satisfied from all the evidence of the guilt of the accused beyond a reasonable doubt. 24 Cyc. 192.

The presumption of innocence does not attend a defendant throughout the whole trial but only until sufficient evidence is introduced to overcome the proof which the law has created. *Coffin* v. *United States*, 156 U. S. 453; *Martin* v. *State*, 104 Alabama, 78; *Wilson* v. *United*

States, 162 U. S. 613; *Considine* v. *United States*, 112 Fed. Rep. 342; *Newson* v. *State*, 107 Alabama, 133, 139.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to review a judgment of the Supreme Court of the State of Alabama, affirming a judgment of conviction in the Montgomery City Court. The statute, upon which the conviction was based, is assailed as in violation of the Fourteenth Amendment of the Constitution of the United States upon the ground that it deprived the plaintiff in error of his liberty without due process of law and denied him the equal protection of the laws, and also of the Thirteenth Amendment and of the act of Congress providing for the enforcement of that Amendment, in that the effect of the statute is to enforce involuntary servitude by compelling personal service in liquidation of a debt.

The statute in question is § 4730 of the Code of Alabama of 1896, as amended in 1903 and 1907. The section of the Code as it stood before the amendments provided that any person who with intent to injure or defraud his employer entered into a written contract for service and thereby obtained from his employer money or other personal property, and with like intent and without just cause, and without refunding the money or paying for the property refused to perform the service, should be punished as if he had stolen it. In 1903 (Gen. Acts, Ala., 1903, p. 345) the section was amended so as to make the refusal or failure to perform the service, or to refund the money or pay for the property, without just cause, *prima facie* evidence of the intent to injure or defraud. This amendment was enlarged by that of 1907. Gen. Acts, Ala., 1907, p. 636. The section, thus amended, reads as follows:

"Any person, who with intent to injure or defraud his

employer, enters into a contract in writing for the performance of any act of service, and thereby obtains money or other personal property from such employer, and with like intent, and without just cause, and without refunding such money, or paying for such property, refuses or fails to perform such act or service, must on conviction be punished by a fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured; and any person, who with intent to injure or defraud his landlord, enters into any contract in writing for the rent of land, and thereby obtains any money or other personal property from such landlord, and with like intent, without just cause, and without refunding such money, or paying for such property, refuses or fails to cultivate such land, or to comply with his contract relative thereto, must on conviction be punished by fine in double the damage suffered by the injured party, but not more than $300, one-half of said fine to go to the county and one-half to the party injured. And the refusal or failure of any person, who enters into such contract, to perform such act or service or to cultivate such land, or refund such money, or pay for such property without just cause shall be prima facie evidence of the intent to injure his employer or landlord or defraud him. That all laws and parts of laws in conflict with the provisions hereof be and the same are hereby repealed."

There is also a rule of evidence enforced by the courts of Alabama which must be regarded as having the same effect as if read into the statute itself, that the accused, for the purpose of rebutting the statutory presumption, shall not be allowed to testify "as to his uncommunicated motives, purpose or intention." *Bailey* v. *The State*, 161 Alabama, 77, 78.

Bailey, the plaintiff in error, was committed for detention on the charge of obtaining fifteen dollars under a

contract in writing with intent to injure or defraud his employer. He sued out a writ of *habeas corpus* challenging the validity of the statute. His discharge was refused and the Supreme Court of the State affirmed the order, holding the statute to be constitutional. 158 Alabama, 18. On writ of error from this court it was held that the case was brought here prematurely, and the questions now presented were expressly reserved. *Bailey* v. *Alabama*, 211 U. S. 452.

Having failed to obtain his release on *habeas corpus*, Bailey was indicted on the following charge:

"The Grand Jury of said County charge, that before the finding of this indictment Alonzo Bailey with intent to injure or defraud his employer The Riverside Company, a corporation, entered into a written contract to perform labor or services for The Riverside Company, a corporation and obtained thereby the sum of Fifteen Dollars from the said The Riverside Company, and afterwards with like intent, and without just cause, failed or refused to perform such labor or services or to refund such money against the peace and dignity of the State of Alabama."

Motion to quash and a demurrer to the indictment were overruled. Upon the trial the following facts appeared: On December 26, 1907, Bailey entered into a written contract with the Riverside Company, which provided:

"That I Lonzo Bailey for and in consideration of the sum of Fifteen Dollars in money, this day in hand paid to me by said The Riverside Co., the receipt whereof, I do hereby acknowledge, I, the said Lonzo Bailey do hereby consent, contract and agree to work and labor for the said Riverside Co. as a farm hand on their Scotts Bend Place in Montgomery County, Alabama, from the 30 day of Dec. 1907, to the 30 day of Dec. 1908, at and for the sum of 12.00 per month.

"And the said Lonzo Bailey agrees to render respectful and faithful service to the said The Riverside Co. and to perform diligently and actively all work pertaining to such employment, in accordance with the instructions of the said The Riverside Co., or ag't.

"And the said The Riverside Co. in consideration of the agreement above mentioned of the said Lonzo Bailey hereby employs the said Lonzo Bailey as such farm hand for the time above set out, and agrees to pay the said Lonzo Bailey the sum of $10.75 per month."

The manager of the employing company testified that at the time of entering into this contract there were present only the witness and Bailey and that the latter then obtained from the company the sum of fifteen dollars; that Bailey worked under the contract throughout the month of January and for three or four days in February, 1908, and then, "without just cause and without refunding the money, ceased to work for said Riverside Company, and has not since that time performed any service for said Company in accordance with or under said contract, and has refused and failed to perform any further service thereunder, and has, without just cause, refused and failed to refund said fifteen dollars." He also testified, in response to a question from the attorney for the defendant and against the objection of the State, that Bailey was a negro. No other evidence was introduced.

The court, after defining the crime in the language of the statute, charged the jury, in accordance with its terms, as follows:

"And the refusal of any person who enters into such contract to perform such act or service, or refund such money, or pay for such property, without just cause, shall be prima facie evidence of the intent to injure his employer, or to defraud him."

Bailey excepted to these instructions, and requested the court to instruct the jury that the statute, and the

provision creating the presumption, were invalid, and further that "the refusal or failure of the defendant to perform the service alleged in the indictment, or to refund the money obtained from the Riverside Co. under the contract between it and the defendant, without cause, does not of itself make out a prima facie case of the defendant's intent to injure or defraud said Riverside Company."

The court refused these instructions and Bailey took exception.

The jury found the accused guilty, fixed the damages sustained by the injured party at fifteen dollars, and assessed a fine of thirty dollars. Thereupon Bailey was sentenced by the court to pay the fine of thirty dollars and the costs, and in default thereof to hard labor "for twenty days in lieu of said fine and one hundred and sixteen days on account of said costs."

On appeal to the Supreme Court of the State the constitutionality of the statute was again upheld and the judgment affirmed. 161 Alabama, 75.

We at once dismiss from consideration the fact that the plaintiff in error is a black man. While the action of a State through its officers charged with the administration of a law, fair in appearance, may be of such a character as to constitute a denial of the equal protection of the laws (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 373), such a conclusion is here neither required nor justified. The statute, on its face, makes no racial discrimination, and the record fails to show its existence in fact. No question of a sectional character is presented, and we may view the legislation in the same manner as if it had been enacted in New York or in Idaho. Opportunities for coercion and oppression, in varying circumstances, exist in all parts of the Union, and the citizens of all the States are interested in the maintenance of the constitutional guarantees, the consideration of which is here involved.

231

Prior to the amendment of the year 1903, enlarged in 1907, the statute did not make the mere breach of the contract, under which the employé had obtained from his employer money which was not refunded or property which was not paid for, a crime. The essential ingredient of the offense was the intent of the accused to injure or defraud. To justify conviction, it was necessary that this intent should be established by competent evidence, aided only by such inferences as might logically be derived from the facts proved, and should not be the subject of mere surmise or arbitrary assumption.

This was the construction which the Supreme Court of Alabama placed upon the statute, as it then stood, in *Ex parte Riley*, 94 Alabama, 82. In that case the court said (pp. 83, 84):

"The ingredients of this statutory offense are: (1) a contract in writing by the accused for the performance of any act or service; (2) an intent on the part of the accused, when he entered into the contract, to injure or defraud his employer; (3) the obtaining by the accused of money or other personal property from such employer by means of such contract entered into with such intent; and (4) the refusal by the accused, with like intent, and without just cause, and without refunding such money, or paying for such property, to perform such act or service. This statute by no means provides that a person who has entered into a written contract for the performance of services, under which he has obtained money or other personal property, is punishable as if he had stolen such money or other personal property, upon his refusal to perform the contract, without refunding the money or paying for the property. A mere breach of a contract is not by the statute made a crime. The criminal feature of the transaction is wanting unless the accused entered into the contract with intent to injure or defraud his employer, and unless his refusal to perform

was with like intent and without just cause. That there was an intent to injure or defraud the employer, both when the contract was entered into and when the accused refused performance, are facts which must be shown by the evidence. As the intent is the design, purpose, resolve or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from the facts and circumstances developed by the proof. *Carlisle* v. *The State*, 76 Alabama, 75; *Mack* v. *The State*, 63 Alabama, 136. In the absence, however, of evidence from which such inferences may be drawn, the jury are not justified in indulging in mere unsupported conjectures, speculations or suspicions as to intentions which were not disclosed by any visible or tangible act, expression or circumstance.— *Green* v. *The State*, 68 Alabama, 539." See also *Dorsey* v. *The State*, 111 Alabama, 40; *McIntosh* v. *The State*, 117 Alabama, 128.

We pass then to the consideration of the amendment, through the operation of which under the charge of the trial court this conviction was obtained. No longer was it necessary for the prosecution to comply with the rule of the *Riley case* (*supra*) in order to establish the intent to injure or defraud which, as the court said, constituted the gist of the offense. It was "the difficulty in proving the intent, made patent by that decision" which "suggested the amendment of 1903." *Bailey* v. *The State*, 158 Alabama, p. 25. By this amendment it was provided, in substance, that the refusal or failure to perform the service contracted for, or to refund the money obtained, without just cause, should be *prima facie* evidence of the intent to injure or defraud.

But the refusal or failure to perform the service, without just cause, constitutes the breach of the contract. The justice of the grounds of refusal or failure must, of course, be determined by the contractual obligation as-

sumed. Whatever the reason for leaving the service, if, judged by the terms of the contract, it is insufficient in law, it is not "just cause." The money received and repayable, nothing more being shown, constitutes a mere debt. The asserted difficulty of proving the intent to injure or defraud is thus made the occasion for dispensing with such proof, so far as the *prima facie* case is concerned. And the mere breach of a contract for personal service, coupled with the mere failure to pay a debt which was to be liquidated in the course of such service, is made sufficient to warrant a conviction.

It is no answer to say that the jury must find, and here found, that a fraudulent intent existed. The jury by their verdict cannot add to the facts before them. If nothing be shown but a mere breach of a contract of service and a mere failure to pay a debt, the jury have nothing else to go upon, and the evidence becomes nothing more because of their finding. Had it not been for this statutory presumption, supplied by the amendment, no one would be heard to say that Bailey could have been convicted.

Prima facie evidence is sufficient evidence to outweigh the presumption of innocence and if not met by opposing evidence to support a verdict of guilty. "It is such as, in judgment of law, is sufficient to establish the fact; and, if not rebutted, remains sufficient for the purpose." *Kelly* v. *Jackson*, 6 Pet. 632.

We are not impressed with the argument that the Supreme Court of Alabama has construed the amendment to mean that the jury is not controlled by the presumption, if unrebutted, and still may find the accused not guilty. That court, in its opinion, said: "Again, it must be borne in mind that the rule of evidence fixed by the statute does not make it the duty of the jury to convict on the evidence referred to in the enactment, if unrebutted, whether satisfied thereby of the guilt of the accused beyond a reasonable doubt or not. On the con-

trary, with such evidence before them, the jury are still left free to find the accused guilty or not guilty, according as they may be satisfied of his guilt or not, by the whole evidence." 161 Alabama, 78.

But the controlling construction of the statute is the affirmance of this judgment of conviction. It is not sufficient to declare that the statute does not make it the *duty* of the jury to convict, where there is no other evidence but the breach of the contract and the failure to pay the debt. The point is that, in such a case, the statute *authorizes* the jury to convict. It is not enough to say that the jury may not accept that evidence as alone sufficient; for the jury may accept it, and they have the express warrant of the statute to accept is as a basis for their verdict. And it is in this light that the validity of the statute must be determined.

It is urged that the time and circumstances of the departure from service may be such as to raise not only an inference, but a strong inference, of fraudulent intent. There was no need to create a statutory presumption and it was not created for such a case. Where circumstances are shown permitting a fair inference of fraudulent purpose, the case falls within the rule of *Ex parte Riley* (*supra*) which governed prosecutions under the statute before the amendment was made. The "difficulty," which admittedly the amendment was intended to surmount, did not exist where natural inferences sufficed. Plainly the object of the statute was to hit cases which were destitute of such inferences, and to provide that the mere breach of the contract and the mere failure to pay the debt might do duty in their absence.

While in considering the natural operation and effect of the statute, as amended, we are not limited to the particular facts of the case at the bar, they present an illuminating illustration. We may briefly restate them. Bailey made a contract to work for a year at $12 a month. He

of the criminal law, the enforcement of the contract for personal service, and the same purpose, tested by like criteria, breathes despite its different phraseology through the amendments of 1903 and 1907 of the statute here in question.

We cannot escape the conclusion that, although the statute in terms is to punish fraud, still its natural and inevitable effect is to expose to conviction for crime those who simply fail or refuse to perform contracts for personal service in liquidation of a debt, and judging its purpose by its effect that it seeks in this way to provide the means of compulsion through which performance of such service may be secured. The question is whether such a statute is constitutional.

This court has frequently recognized the general power of every legislature to prescribe the evidence which shall be received, and the effect of that evidence in the courts of its own government. *Fong Yue Ting* v. *United States*, 149 U. S. 698, 749. In the exercise of this power numerous statutes have been enacted providing that proof of one fact shall be *prima facie* evidence of the main fact in issue; and where the inference is not purely arbitrary and there is a rational relation between the two facts, and the accused is not deprived of a proper opportunity to submit all the facts bearing upon the issue, it has been held that such statutes do not violate the requirements of due process of law. *Adams* v. *New York*, 192 U. S. 585; *Mobile, Jackson & Kansas City Railroad Co.* v. *Turnipseed*, decided December 19, 1910, *ante*, p. 35.

The latest expression upon this point is found in the case last cited, where the court, by Mr. Justice Lurton, said: "That a legislative presumption of one fact from evidence of another may not constitute a denial of due process of law or a denial of the equal protection of the law it is only essential that there shall be some rational connection between the fact proved and the ultimate fact

presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate. So, also, it must not, under guise of regulating the presentation of evidence, operate to preclude the party from the right to present his defense to the main fact thus presumed. If a legislative provision not unreasonable in itself prescribing a rule of evidence, in either criminal or civil cases, does not shut out from the party affected a reasonable opportunity to submit to the jury in his defense all of the facts bearing upon the issue, there is no ground for holding that due process of law has been denied him."

In this class of cases where the entire subject-matter of the legislation is otherwise within state control, the question has been whether the prescribed rule of evidence interferes with the guaranteed equality before the law or violates those fundamental rights and immutable principles of justice which are embraced within the conception of due process of law. But where the conduct or fact, the existence of which is made the basis of the statutory presumption, itself falls within the scope of a provision of the Federal Constitution, a further question arises. It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions. And the State may not in this way interfere with matters withdrawn from its authority by the Federal Constitution or subject an accused to conviction for conduct which it is powerless to proscribe.

In the present case it is urged that the statute as amended, through the operation of the presumption for which it provides, violates the Thirteenth Amendment of the Constitution of the United States and the act of Congress passed for its enforcement.

The Thirteenth Amendment provides:

"SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

"SECTION 2. Congress shall have power to enforce this article by appropriate legislation."

Pursuant to the authority thus conferred, Congress passed the act of March 2, 1867, c. 187, 14 Stat. 546, the provisions of which are now found in §§ 1990 and 5526 of the Revised Statutes, as follows:

"SEC. 1990. The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in the Territory of New Mexico, or in any other Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of the Territory of New Mexico, or of any other Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void."

"SEC. 5526. Every person who holds, arrests, returns, or causes to be held, arrested, or returned, or in any manner aids in the arrest or return of any person to a condition of peonage, shall be punished by a fine of not less than one thousand nor more than five thousand dollars, or by imprisonment not less than one year nor more than five years, or by both."

The language of the Thirteenth Amendment was not new. It reproduced the historic words of the ordinance of 1787 for the government of the Northwest Territory and gave them unrestricted application within the United States and all places subject to their jurisdiction. While the immediate concern was with African slavery, the

Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.

The words involuntary servitude have a "larger meaning than slavery." "It was very well understood that in the form of apprenticeship for long terms, as it had been practiced in the West India Islands, on the abolition of slavery by the English government, or by reducing the slaves to the condition of serfs attached to the plantation, the purpose of the article might have been evaded, if only the word slavery had been used." *Slaughter House Cases*, 16 Wall. p. 69. The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude.

While the Amendment was self-executing, so far as its terms were applicable to any existing condition, Congress was authorized to secure its complete enforcement by appropriate legislation. As was said in the *Civil Rights cases:* "By its own unaided force and effect it abolished slavery, and established universal freedom. Still, legislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit. And such legislation may be primary and direct in its character; for the Amendment is not a mere prohibition of state laws establishing or upholding slavery, but an absolute declaration that slavery or involuntary servitude shall not exist in any part of the United States." 109 U. S. 20.

The act of March 2, 1867 (Rev. Stat., §§ 1990, 5526, *supra*), was a valid exercise of this express authority. *Clyatt* v. *United States*, 197 U. S. 207. It declared that all laws of any State, by virtue of which any attempt should be made "to establish, maintain, or enforce, directly or

indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," should be null and void.

Peonage is a term descriptive of a condition which has existed in Spanish America, and especially in Mexico. The essence of the thing is compulsory service in payment of a debt. A peon is one who is compelled to work for his creditor until his debt is paid. And in this explicit and comprehensive enactment, Congress was not concerned with mere names or manner of description, or with a particular place or section of the country. It was concerned with a fact, wherever it might exist; with a condition, however named and wherever it might be established, maintained or enforced.

The fact that the debtor contracted to perform the labor which is sought to be compelled does not withdraw the attempted enforcement from the condemnation of the statute. The full intent of the constitutional provision could be defeated with obvious facility if, through the guise of contracts under which advances had been made, debtors could be held to compulsory service. It is the compulsion of the service that the statute inhibits, for when that occurs the condition of servitude is created, which would be not less involuntary because of the original agreement to work out the indebtedness. The contract exposes the debtor to liability for the loss due to the breach, but not to enforced labor. This has been so clearly stated by this court in the case of *Clyatt*, *supra*, that discussion is unnecessary. The court there said:

"The constitutionality and scope of sections 1990 and 5526 present the first questions for our consideration. They prohibit peonage. What is peonage? It may be defined as a status or condition of compulsory service, based upon the indebtedness of the peon to the master. The basal fact is indebtedness. As said by Judge Benedict, delivering the opinion in *Jaremillo* v. *Romero*, 1 N. Mex.

190, 194: 'One fact existed universally; all were indebted to their masters. This was the cord by which they seemed bound to their masters' service.' Upon this is based a condition of compulsory service. Peonage is sometimes classified as voluntary or involuntary, but this implies simply a difference in the mode of origin, but none in the character of the servitude. The one exists where the debtor voluntarily contracts to enter the service of his creditor. The other is forced upon the debtor by some provision of law. But peonage, however created, is compulsory service, involuntary servitude. The peon can release himself therefrom, it is true, by the payment of the debt, but otherwise the service is enforced. A clear distinction exists between peonage and the voluntary performance of labor or rendering of services in payment of a debt. In the latter case the debtor, though contracting to pay his indebtedness by labor or service, and subject like any other contractor to an action for damages for breach of that contract, can elect at any time to break it, and no law or force compels performance or a continuance of the service. We need not stop to consider any possible limits or exceptional cases, such as the service of a sailor, *Robertson* v. *Baldwin*, 165 U. S. 275, or the obligations of a child to its parents, or of an apprentice to his master, or the power of the legislature to make unlawful and punish criminally an abandonment by an employé of his post of labor in any extreme cases. That which is contemplated by the statute is compulsory service to secure the payment of a debt." 197 U. S. pp. 215, 216.

The act of Congress, nullifying all state laws by which it should be attempted to enforce the "service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise," necessarily embraces all legislation which seeks to compel the service or labor by making it a crime to refuse or fail to perform it. Such laws would furnish the readiest means of compulsion. The Thirteenth

Amendment prohibits involuntary servitude except as punishment for crime. But the exception, allowing full latitude for the enforcement of penal laws, does not destroy the prohibition. It does not permit slavery or involuntary servitude to be established or maintained through the operation of the criminal law by making it a crime to refuse to submit to the one or to render the service which would constitute the other. The State may impose involuntary servitude as a punishment for crime, but it may not compel one man to labor for another in payment of a debt, by punishing him as a criminal if he does not perform the service or pay the debt.

If the statute in this case had authorized the employing company to seize the debtor and hold him to the service until he paid the fifteen dollars, or had furnished the equivalent in labor, its invalidity would not be questioned. It would be equally clear that the State could not authorize its constabulary to prevent the servant from escaping and to force him to work out his debt. But the State could not avail itself of the sanction of the criminal law to supply the compulsion any more than it could use or authorize the use of physical force. "In contemplation of the law the compulsion to such service by the fear of punishment under a criminal statute is more powerful than any guard which the employer could station." *Ex parte Hollman* (S. Car.), 60 S. E. Rep. 24.

What the State may not do directly it may not do indirectly. If it cannot punish the servant as a criminal for the mere failure or refusal to serve without paying his debt, it is not permitted to accomplish the same result by creating a statutory presumption which upon proof of no other fact exposes him to conviction and punishment. Without imputing any actual motive to oppress, we must consider the natural operation of the statute here in question (*Henderson* v. *Mayor*, 92 U. S. p. 268), and it is apparent that it furnishes a convenient instrument for the coer-

cion which the Constitution and the act of Congress forbid; an instrument of compulsion peculiarly effective as against the poor and the ignorant, its most likely victims. There is no more important concern than to safeguard the freedom of labor upon which alone can enduring prosperity be based. The provisions designed to secure it would soon become a barren form if it were possible to establish a statutory presumption of this sort and to hold over the heads of laborers the threat of punishment for crime, under the name of fraud but merely upon evidence of failure to work out their debts. The act of Congress deprives of effect all legislative measures of any State through which directly or indirectly the prohibited thing, to wit, compulsory service to secure the payment of a debt may be established or maintained; and we conclude that § 4730, as amended, of the Code of Alabama, in so far as it makes the refusal or failure to perform the act or service, without refunding the money or paying for the property received, *prima facie* evidence of the commission of the crime which the section defines, is in conflict with the Thirteenth Amendment and the legislation authorized by that Amendment, and is therefore invalid.

In this view it is unnecessary to consider the contentions which have been made under the Fourteenth Amendment. As the case was given to the jury under instructions which authorized a verdict in accordance with the statutory presumption, and the opposing instructions requested by the accused were refused, the judgment must be reversed.

Reversed and cause remanded for further proceedings not inconsistent with this opinion.

MR. JUSTICE HOLMES, with whom concurred MR. JUSTICE LURTON, dissenting.

WE all agree that this case is to be considered and decided in the same way as if it arose in Idaho or New York.

Neither public document nor evidence discloses a law which by its administration is made something different from what it appears on its face, and therefore the fact that in Alabama it mainly concerns the blacks does not matter. *Yick Wo* v. *Hopkins*, 118 U. S. 356, does not apply. I shall begin then by assuming for the moment what I think is not true and shall try to show not to be true, that this statute punishes the mere refusal to labor according to contract as a crime, and shall inquire whether there would be anything contrary to the Thirteenth Amendment or the statute if it did, supposing it to have been enacted in the State of New York. I cannot believe it. The Thirteenth Amendment does not outlaw contracts for labor. That would be at least as great a misfortune for the laborer as for the man that employed him. For it certainly would affect the terms of the bargain unfavorably for the laboring man if it were understood that the employer could do nothing in case the laborer saw fit to break his word. But any legal liability for breach of a contract is a disagreeable consequence which tends to make the contractor do as he said he would. Liability to an action for damages has that tendency as well as a fine. If the mere imposition of such consequences as tend to make a man keep to his promise is the creation of peonage when the contract happens to be for labor, I do not see why the allowance of a civil action is not, as well as an indictment ending in fine. Peonage is service to a private master at which a man is kept by bodily compulsion against his will. But the creation of the ordinary legal motives for right conduct does not produce it. Breach of a legal contract without excuse is wrong conduct, even if the contract is for labor, and if a State adds to civil liability a criminal liability to fine, it simply intensifies the legal motive for doing right, it does not make the laborer a slave.

But if a fine may be imposed, imprisonment may be

imposed in case of a failure to pay it. Nor does it matter if labor is added to the imprisonment. Imprisonment with hard labor is not stricken from the statute books. On the contrary, involuntary servitude as a punishment for crime is excepted from the prohibition of the Thirteenth Amendment in so many words. Also the power of the States to make breach of contract a crime is not done away with by the abolition of slavery. But if breach of contract may be made a crime at all, it may be made a crime with all the consequences usually attached to crime. There is produced a sort of illusion if a contract to labor ends in compulsory labor in a prison. But compulsory work for no private master in a jail is not peonage. If work in a jail is not condemned in itself, without regard to what the conduct is it punishes, it may be made a consequence of any conduct that the State has power to punish at all. I do not blink the fact that the liability to imprisonment may work as a motive when a fine without it would not, and that it may induce the laborer to keep on when he would like to leave. But it does not strike me as an objection to a law that it is effective. If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the State should not throw its weight on the side of performance. There is no relation between its doing so in the manner supposed and allowing a private master to use private force upon a laborer who wishes to leave.

But all that I have said so far goes beyond the needs of the case as I understand it. I think it a mistake to say that this statute attaches its punishment to the mere breach of a contract to labor. It does nor purport to do so; what it purports to punish is fraudulently obtaining money by a false pretense of an intent to keep the written contract in consideration of which the money is advanced. (It is not necessary to cite cases to show that such an in-

tent may be the subject of a material false representation.) But the import of the statute is supposed to be changed by the provision that a refusal to perform, coupled with a failure to return the money advanced, shall be *prima facie* evidence of fraudulent intent. I agree that if the statute created a conclusive presumption it might be held to make a disguised change in the substantive law. *Keller* v. *United States*, 213 U. S. 138, 150. But it only makes the conduct *prima facie* evidence, a very different matter. Is it not evidence that a man had a fraudulent intent if he receives an advance upon a contract over night and leaves in the morning? I should have thought that it very plainly was. Of course the statute is in general terms and applies to a departure at any time without excuse or repayment, but that does no harm except on a tacit assumption that this law is not administered as it would be in New York, and that juries will act with prejudice against the laboring man. For *prima facie* evidence is only evidence, and as such may be held by the jury insufficient to make out guilt. 161 Alabama, 78. This was decided by the Supreme Court of Alabama in this case, and we should be bound by their construction of the statute, even if we thought it wrong. But I venture to add that I think it entirely right. *State* v. *Intoxicating Liquors*, 80 Maine, 57. This being so, I take it that a fair jury would acquit, if the only evidence were a departure after eleven months' work, and if it received no color from some special well-known course of events. But the matter well may be left to a jury, because their experience as men of the world may teach them that in certain conditions it is so common for laborers to remain during a part of the season, receiving advances, and then to depart at the period of need in the hope of greater wages at a neighboring plantation, that when a laborer follows that course there is a fair inference of fact that he intended it from the beginning. The Alabama stat-

ute, as construed by the state court and as we must take it, merely says, as a court might say, that the prosecution may go to the jury. This means and means only that the court cannot say, from its knowledge of the ordinary course of events, that the jury could not be justified by its knowledge in drawing the inference from the facts proved. In my opinion the statute embodies little if anything more than what I should have told the jury was the law without it. The right of the State to regulate laws of evidence is admitted, and the statute does not go much beyond the common law. *Commonwealth* v. *Rubin*, 165 Massachusetts, 453.

I do not see how the result that I have reached thus far is affected by the rule laid down by the court, but not contained in the statute, that the prisoner cannot testify to his uncommunicated intentions, and therefore, it is assumed, would not be permitted to offer a naked denial of an intent to defraud. If there is an excuse for breaking the contract it will be found in external circumstances, and can be proved. So the sum of the wrong supposed to be inflicted is that the intent to go off without repaying may be put further back than it would be otherwise. But if there is a wrong it lies in leaving the evidence to the jury, a wrong that is not affected by the letting in or keeping out an item of evidence on the other side. I have stated why I think it was not a wrong.

To sum up, I think that obtaining money by fraud may be made a crime as well as murder or theft; that a false representation, expressed or implied, at the time of making a contract of labor that one intends to perform it and thereby obtaining an advance, may be declared a case of fraudulently obtaining money as well as any other; that if made a crime it may be punished like any other crime, and that an unjustified departure from the promised service without repayment may be declared a sufficient case to go to the jury for their judgment; all without in any

way infringing the Thirteenth Amendment or the statutes of the United States.

MR. JUSTICE LURTON concurs in this dissent.